(30,239)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 929

REALTY HOLDING COMPANY, APPELLANT,

vs.

LAVINA B. DONALDSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 13, 1924

[fol. 1] **IN UNITED STATES DISTRICT COURT**

BILL OF COMPLAINT—Filed July 17, 1923

To the Honorable Judges in the District Court of the United States, Eastern District of Michigan, Southern Division:

The Realty Holding Company, a corporation organized and existing under the laws of the State of Delaware and having its principal office in the City of Wilmington in the State of Delaware, and having a branch office in the City of Detroit, brings this its bill of complaint against Lavina B. Donaldson, a resident of the City of Detroit, Michigan, a city within the territorial jurisdiction of the said court, and shows to the court that,

(1) About six months prior to March 31st, 1922, the defendant Lavina B. Donaldson was seized and possessed of Lots Thirty-three (33), Thirty-four (34), and the west fifty-seven (57) feet of Lot Thirty-five (35) of Duffield's Subdivision, Park Lots Eighty (80) and Eighty-one (81) of the 10,000 Acre Tract in the City of Detroit, Michigan, according to the plat thereof recorded in Liber 49 of Plats, page 573, Wayne County Records, subject to a mortgage to the Guaranty Trust Company of Detroit about to become due with accrued interest and taxes amounting substantially to Twenty-eight Thousand Dollars ($28,000) foreclosure of which was then being threatened and which the said defendant was financially unable to redeem and which the mortgagee refused to renew or extend, and by foreclosure of which the title to the said defendant would have been lost.

(2) Being thus threatened with the loss of her said property, the said defendant enlisted the services of one Robert M. Drysdale to devise and execute some plan by which the said property could be saved and made to produce an income and said defendant secured against danger of loss; and to induce said Robert M. Drysale to un-
[fol. 2] dertake to save the said property, the said defendant represented and promised to him that if he would do so she would join in the execution of any mortgages necessary to accomplish that purpose and would execute a lease to him or any person by him nominated for a period of time sufficient to enable him to reimburse from sub-leasing of the said premises all advances and loans necessary to pay off the said mortgage, erect a building upon the said premises suitable to make same produce an income and to repay to the said Robert M. Drysdale his investment in money, time and services in effectuating the said object.

(3) In pursuance of and in reliance upon which representations and promises of the said defendant the said Robert M. Drysdale did undertake to raise the money to pay off the said incumbrance and erect a fireproof building upon the said premises suitable to accomplish the said purposes, and in the course of the said negotia-

tions the said Robert M. Drysdale discovered that, by reason of the lack of title in the said defendant to the east 43′ of Lot Thirty-five aforesaid, the said premises were not adapted to the said purpose; and therefore at the instance and request of the said defendant and in further prosecution of the said design the said Robert M. Drysdale did expend a great deal of time and Twenty-five Thousand Dollars ($25,000) in cash in procuring transfer to the said defendant of the east 43′ of said Lot Thirty-five, by the addition of which tract to the property previously held by the said defendant the value of the original tract was at least doubled by being made fit and suitable for said site for a modern ten story fire proof building, for which purpose it could not have been used as effectually without such addition; and, in further prosecution of the said design, the said Robert M. Drysdale also negotiated and procured a loan of Five Hundred Thousand Dollars ($500,000), secured by a mortgage on the said premises, to be used in the construction of said building and expenses incident thereto, and in further pursuance of the same purpose the said Robert M. Drysdale paid off and discharged the mortgage to the said Guaranty Trust Company and the accrued interest and unpaid taxes upon the said premises.

[fol. 3] (4) As a result of which there was created between the said defendant and the said Robert M. Drysdale a relation of trust and confidence whereby it became and was the duty of the said defendant to co-operate with him in accomplishing the said object and to refrain from doing anything or act whereby he would be embarrassed or put to loss in effectuating the same.

(5) In further execution of which understanding the said defendant, at the instance and request of the said Robert M. Drysdale and in further execution of the said plan, executed to the Clifford Land Company, a corporation organized and existing under the laws of the State of Michigan a certain lease upon the entire site created as aforesaid, a copy of which is hereto attached, marked Exhibit A, and made a part of this bill of complaint to all intents as if here set out at length; whereby also the said defendant undertook and promised to the said Clifford Land Company that she would execute a mortgage for Five Hundred Thousand Dollars ($500,000) and a further mortgage of Two Hundred Fifty Thousand Dollars ($250,000), the proceeds to be used in the construction of the said building and all expenses incidental thereto, and further agreed that she would execute such renewals as may be necessary to extend the time of payment of principal of such mortgages sufficiently to permit their payment at the rate of Thirty Thousand Dollars ($30,000) a year after the first two years.

(6) And, in consideration of the issuance and delivery to this plaintiff of certain shares of stock in the said Clifford Land Company at the instance and request of the said Robert M. Drysdale and the said defendant, this plaintiff executed and delivered to the said defendant a deed of certain other property known as Lots One (1) to Eight (8) inclusive of Moore & Veale's Subdivision of the

northerly part of the west half of the northwest quarter of the southeast quarter of Section Twenty-nine (29), Greenfield Township, Wayne County, Michigan, and Lot Two Hundred (200) of Adelph Sloman's Woodward Avenue Subdivision of part of the southeast [fol. 4] quarter section thirty-four (34) Town One, North Range 11 East, State of Michigan, and a contract equity in Lot Five (5), Block Five (5) on Main Street in the Village of Richmond, State of Michigan, as security to the said defendant that the said building would be erected and all labor and material therefor paid for in accordance with the terms of the said lease, which property so conveyed was of the value of Twenty-five Thousand Dollars ($25,000) *Dollars* and which premises the said defendant agreed to reconvey to this plaintiff upon the completion of the said building in accordance with the terms of the said lease and payment in full for all labor and material therefor by the lessee as in said lease provided.

(7) And in further execution of the said purpose and plan the said Robert M. Drysdale and the Clifford Land Company proceeded to and did erect upon the said premises a ten story fireproof apartment building of the value of approximately One Million Two Hundred Fifty Thousand Dollars ($1,250,000) which building is now just ready for lease and occupancy; by which efforts and expenditures of the said Robert M. Drysdale, Clifford Land Company, and this plaintiff the said defendant has been given title to the said premises subject to the said lease and subject to the interest of the said Clifford Land Company in said building and the equity of the said defendant over and above encumbrances has thereby been increased by the acts aforesaid from $50,000 to $750,000 without any expenditure of money or effort by the said defendant to create the said value other than as aforesaid.

(8) As the erection of said building progressed, it became apparent that the two mortgages aforesaid were very adverse to the interests of the said Robert M. Drysdale, Clifford Land Company, and this plaintiff in that the said mortgages matured too early and both mortgages carried seven per cent (7%) interest and the total annual payments on the principal of the two mortgages, which were $37,500, were too heavy for the building to carry; whereupon the said Robert M. Drysdale and the Clifford Land Company at the instance and request of the said defendant negotiated for an ex- [fol. 5] tension of the said loan pursuant to the agreement aforesaid with the said defendant and succeeded in obtaining an offer of a loan of Seven Hundred Fifty Thousand Dollars ($750,000) on terms which would enable the said Robert M. Drysdale and Clifford Land Company to discount the bonds outstanding under the second mortgage in the sum of One Hundred Twenty-five Thousand Dollars ($125,000) to pay the entire financing charges of the new loan and all accrued interest, taxes, ground rent, and all the other items, and leave a surplus and pay only six per cent (6%) interest on such new loan instead of the seven per cent, required by the original mortgages, and the payments under which new loans would be much more reduced and extended than under said original

mortgages, and by execution of which the said Robert M. Drysdale and the Clifford Land Company would have been enabled to perform all of their obligations under said undertaking with the said defendant and pursuant to the terms of the said lease executed in furtherance thereof.

(9) All of which matters and negotiations were made known to the said defendant by the said Robert M. Drysdale and Clifford Land Company, who duly and in writing requested her to join in the execution of such renewal mortgage for the purpose of extending the time of payment and reducing the amount of indebtedness as in said lease she covenanted to do; but the said defendant finally and flatly refused to execute the same or any further mortgage, thinking that by refusing to execute the said renewal mortgage in violation of her said undertaking with the said Robert M. Drysdale and the said Clifford Land Company she could so embarrass them as to disable them to complete the said undertaking and to perform the covenants in the said lease contained, and designing thereby and craftily intending to cheat, wrong and defraud the said Robert M. Drysdale, Clifford Land Company and this plaintiff of all the fruits of their effort in carrying out the said purpose and utterly deprive them and this plaintiff of all their rights in the premises and wrongfully to appropriate to herself all of the profits and values which the said Robert M. Drysdale, Clifford Land Company and this plaintiff had, by their said expenditures, created in reliance upon the said promises [fol. 6] of the said defendant and in full faith believing that she intended to and would fulfil and perform her part of the said plan and undertaking.

(10) After which refusal the said Robert M. Drysdale and Clifford Land Company, pursuant to the provisions in the said lease contained, served a notice in writing upon said defendant of the appointment of an arbitrator to settle any differences that might arise between them concerning their rights under the said lease; but the said defendant, instead of appointing an arbitrator to represent her in settling any matters appertaining to said new loan, refused to so arbitrate the same and instead thereof caused a notice to be served on said Clifford Land Company to vacate said premises or make payment of ground rental which she claimed to be past due, thereby violating her said lease and making the initial steps to attempt to secure said property for herself in accordance with her evil designs as hereinbefore set forth, a copy of which said notice is annexed hereto, marked Exhibit B, and made a part of this bill of complaint as fully as if herein set out at length, whereby said defendant, as this plaintiff is informed and believes and charges the fact to be, intends to attempt to foreclose and forfeit all of the rights of the said Clifford Land Company and Robert M. Drysdale and this plaintiff in the said premises and appropriate all of the said properties entirely to her own use.

(11) The plaintiff further charges the fact to be that the defendant in order to effectuate her said evil designs on said property has hindered and delayed the said Clifford Land Company and this plain-

tiff in subleasing said premises and in procuring furnishings for same and in procuring a purchaser for same in this, that she has slandered the title of the said Clifford Land Company in and to the said property by causing her agents and servants to show people through said property, offering leases on parts thereof and in negotiating for the furnishing thereof as of her own property and in one instance caused to be removed from said property a sign displayed thereon by said Clifford Land Company which might lead to [fol. 7] the sale of the said premises, all which doings on the part of the said defendant were contrary to the terms of the said lease and the relationship between her and the said Clifford Land Company and the said Robert M. Drysdale and materially hampered the said Clifford Land Company in securing the funds out of said enterprise with which to meet the accruing interest obligations on the said building according to the terms of said lease.

(12) And plaintiff further shows that if the said defendant will perform her part of said leasehold agreement and join with the plaintiff in the execution of the renewal mortgages on said property and refrain from slandering the title of the plaintiff is regard to said property the plaintiff will be able to meet all of its obligations as in said lease contained.

(13) In order to protect its rights and property in the premises and to secure itself against a risk of loss of the properties pledged as aforesaid and to enable itself more effectually and freely to act for that purpose without hindrance or embarrassment, this plaintiff has, for a valuable consideration to them paid, procured an assignment to it of all the rights and interests of the said Robert M. Drysdale and Clifford Land Company in the premises whereby the said Robert M. Drysdale and Clifford Land Company have ceased to have any right or interest in the premises either against the said defendant or against this plaintiff.

(14) The grounds upon which the jurisdiction of this court in this action depend are the facts as to citizenship of the parties hereinbefore alleged and the further fact that the property which is the subject matter of this suit is located within the territorial jurisdiction of this court, for more particulars whereof reference is made to the remainder of this bill and upon the further fact that the property involved in this action exceeds by many thousand dollars the jurisdictional amount of value of $3,000 required by the statutes in such case made and provided and the rules of this court.

[fol. 8] Wherefore, and forasmuch as the plaintiff is wholly without remedy at law and can have adequate and complete redress only in the court of chancery to which such matters truly and properly belong, this plaintiff respectfully prays:

(a) That proper process issue out of and under the decree of this court address to the said defendant therein and thereby commanding her to appear in this court and answer this plaintiff in the

premises upon peril of having a decree by default against her according to the practice of this court.

(b) That the said defendant full, true and perfect answer make to all and singular the matters in this bill set forth as if specifically and severally interrogated thereon but not under oath, answer on oath being hereby expressly waived.

(c) That this court ascertain, determine, and decree the rights of this plaintiff in the premises.

(d) That this court decree specific performance by the said defendant of her said several undertakings and that the said defendant be strictly enjoined by this court from interfering with the execution and completion by this plaintiff of the said original design and purpose as above set forth.

(e) That the said defendant be prevented by decree of this court from taking any advantage of this plaintiff by reason of her failure and refusal to fulfil and perform her part of the said undertaking or by reason of any embarrassment under which she has placed this plaintiff and its assignors in the premises by her said fraud and breach of trust in contract relations.

(f) That this plaintiff have such other and further relief in the premises as shall be agreeable to equity and good conscience and to the court shall seem meet.

And the plaintiff will ever pray:

Realty Holding Company, By Robert M. Drysdale, Secretary.

[fol. 9] John R. Rood, Attorney for the Plaintiff, Business Address, 838, Dime Bank Bldg., Detroit, Michigan.

Jurat showing the foregoing was duly sworn to by Robert M. Drysdale omitted in printing.

[fol. 10] PLAINTIFF'S "EXHIBIT A" TO BILL OF COMPLAINT

This indenture made this 31st day of March in the year 1922, A. D. between Lavina B. Donaldson, of the City of Detroit, County of Wayne and State of Michigan, hereinafter referred to as the lessor, party of the first part, and the Clifford Land Company a Michigan corporation, of Detroit, Wayne County, Michigan, hereinafter referred to as the Lessee, party of the second part, witnesseth as follows:

Section I. Description of Property.—The lessor for and in consideration of the rents to be paid and the covenants and agreements herein to be performed and fulfilled by the Lessee as hereinafter stipulated has demised and leased and does hereby demise and lease unto the lessee all those certain pieces or parcels of land situate and being in the City of Detroit, Wayne County, Michigan, more particularly described as follows, to-wit:

Lot numbered Thirty-three (33) Thirty-four (34) and Thirty-Five (35) of the Duffield Subdivision of Park Lots Eighty and Eighty-one (80 & 81) according to the recorded plat thereof being One Hundred Two and Thirty-one hundredths feet (102.30) feet running from the Northeast corner of Clifford St. and Duffield St. on the said Clifford St.

To have and to hold the said premises to the said lessee, for and during the term of Thirty-Three (33) years from and after the first day of April 1922 A. D. That is to say beginning on the first day of April 1922 and terminating on the 31st day of March 1955 at mid-night, unless the said term shall be sooner terminated under provisions hereof; said lessee to pay rent therefor as hereinafter provided and specified.

Section 2. Payment for Lease.—The lessee in consideration of the leasing of the premises aforesaid hereby covenants and agrees to and with the lessor, to pay the lessor, her heirs, executors, administrators or assigns the sum of Thirty Thousand ($30,000.00) Dollars in cash upon the signing of this lease and the rent for the said demised [fol. 11] premises as follows:

(a) The sum of Three Hundred Twelve and 50/100 ($312.50) Dollars on the first day of every month until and including the first day of March 1924.

(b) The sum of Four Hundred Sixty-eight and 75/100 ($468.75) on the first day of April 1924 until and including the first day of March 1925.

(c) The sum of Six Hundred Twenty-five Dollars ($625.00) on the first day of April 1926 until and including the first day of March 1932.

(d) A sum equal to one half of one per cent of the value of the said land determined as hereinafter provided on the first day of each month from and including the first day of April 1932 and to and including the first day of March 1955.

Section 3. The value of the said land for the purpose of fixing the amount of the rent, shall be determined as follows:

(a) During the month of August 1931 the lessor and the lessee shall endeavor to agree upon the value of the said property.

(b) If the lessor and the lessee fail to so agree, then the value of the property shall during the months of September and October 1931 be determined by appraisers appointed in the manner hereinafter provided.

(c) During the month of August 1941 the lessor and the lessee shall endeavor to agree upon the value of the said property.

(d) If the lessor and the lessee fail to so agree upon the value of the property during the said month of August 1941, the value of the said property shall be fixed by appraisers as hereinafter provided.

(e) The value of the property as fixed pursuant to subdivisions (a) and (b) of this section shall determine the rent to be paid during the period from and including the month of March 1932; to and including the month of March 1942; the rent being paid for what is the second period of this lease. The valuation of the said property as fixed under the provisions (c) and (d) of this section shall [fol. 12] determine the amount of rent to be paid from and including the month of April 1942 to March 1955 inclusive.

(f) All agreements between the parties hereto as to the value of the said property shall be evidenced by writing, executed by the parties in such manner as to entitle the same to be recorded in the office of the Register of Deeds for Wayne County, and all determinations of value to be made by appraisers, as hereinafter provided, shall have annexed to them a writing executed by all the parties hereto in such manner as to entitle the same to be recorded in the office of the said Register of Deeds expressing the agreement of the parties.

(g) Notwithstanding any of the foregoing provisions of this section, any appraisal of the value of this property at less than the sum of One Hundred Twenty-five Thousand Dollars shall not be binding upon the lessor, and in that case, the value of the said property for the purposes of this lease for that part of the times to which said appraisal is intended to appertain shall be taken to be One Hundred Twenty-five Thousand Dollars ($125,000.00).

Section 4. All of such installments of rent shall be paid in gold coin of the United States of America, of or equal to the present standard of weight and fineness or its equivalent at such bank or trust company in the city of Detroit, Michigan, or to such agent or attorney of said lessor, who shall have an office in the said city of Detroit, as the lessor, her heirs, executors, administrators or assigns may from time to time designate in writing. It is agreed that any acceptance by the lessor of any coinage, currency or checks in payment of any installment or installments of rent hereunder shall not be construed to be a waiver on the part of the lessor of her right to demand and receive payments of any of the unpaid installments [fol. 13] of rent hereunder in such gold coin of the United States.

Section 5. Rate of Interest for Default.—It is agreed by the lessee that all rents reserved hereunder, and all sums payable by the lessee under the terms of this lease shall draw interest at the rate of seven per cent from the day when the same are respectively payable, until paid.

Section 6. Taxes, etc.—The lessee further covenants and agrees to and with the lessor that it will within thirty days after the same become due and payable, during the entire term of this lease pay in the name of the lessor, as additional rent for the said premises, all water rates, taxes and assessments, general and special, ordinary and extraordinary, of every kind whatsoever, and all public charges and all governmental charges of every kind and description (except income and inheritance taxes so-called) which may be levied or

assessed, or have become due during the continuance of this lease upon or against the said land and the premises hereby demised, or upon or against any building or improvements now located upon said premises, or upon or against the building or any building hereafter erected thereon, as herein provided, or upon or against any building or improvement of any kind which may at any time during the term of this lease be erected, placed or constructed on the said demised premises, or levied or assessed or become due upon or against the leasehold interest hereby created or levied or assessed upon or against the interest of the lessor in or under this lease, during the term of this lease, or upon the estate or interest of the lessor in the fee, including all special assessments levied or assessed subsequent to the date of this lease, it being understood and agreed that the lessee will pay the city taxes due and payable in 1922 and the lessee agrees that it will procure and furnish to the lessor a duplicate receipt or receipts for all [fol. 14] taxes, assessments, charges, water rates, public or governmental charges paid by it within thirty days from the date of such payment.

Section 7. Payment of Taxes, etc., by Lessor.—In case of the failure, neglect or refusal of the lessee within thirty days, to make all the payments which by the terms of section six hereof it is required to make within the time limited in section six for making such payment, the lessor may, at her option, at any time after the period so limited, make such payments and may cancel and clear off all tax sales, liens and charges upon or against the said demised premises resulting from such failure, neglect or refusal of the said lessee, and the amounts so paid, including reasonable expenses shall be forthwith repaid by the said lessee to the said lessor; together with interest thereon at the rate of seven per cent per annum pending the date of such repayment.

Section 8. Erection of New Building by Lessee.—The lessee hereby covenants and agrees that it will erect and construct on the said premises in place of the present buildings thereon in accordance with the plans and specifications which have been agreed upon by the lessor and lessee, such agreement being endorsed upon such plans and specifications signed by both parties. Before the lessee shall commence the removal of the buildings now standing on the said premises, it shall give security for the construction and completion of the said proposed new building in accordance with said plans and specifications and for the payment and discharge of all claims for labor and material furnished thereon and all the claims which might constitute mechanics or other liens thereon, by procuring the conveyance to lessor of certain real estate described in an agreement of even date herewith between Robert M. Drysdale and Lavina B. Donaldson said real estate to be held as such security in accordance with the terms of said agreement. Said new building to be completed within a reasonable time after date hereof.

[fol. 15] Section 9. Care of Building and Premises.—Said lessee further covenants and agrees with said lessor that during the con-

tinuance of this lease, the lessee shall and will at all times and at its own expense and charge, keep the buildings and improvements on said premises, and any improvements or buildings that may hereafter be erected or placed thereon during the continuance of this lease, in good repair and in safe and tenantable condition.

Section 10. Injury or Destruction of Building.—Whenever any buildings on said land are destroyed or injured by the elements, or in any way as to be untenantable or unfit for occupancy, the lessee shall not have the right to quit and deliver up and surrender possession of the building or buildings on the land so injured, destroyed or rendered untenantable or unfit for occupancy and the said lessee shall continued liable to the lessor to pay all the rents reserved by the lease.

Section 11. Insurances.—The lessee further covenants and agrees with the lessor that it, the lessee, will during the term of this lease, at its own expense keep and maintain the buildings now or hereafter on the premises, insured against loss and damage by fire for the reasonable insurance value thereof, by policies issued by insurance companies lawfully doing business in the State of Michigan, and satisfactory to the said lessor; all policies of insurance obtained and carried under provisions of this section shall provide that the loss, if any shall be payable first to the mortgagees of the fee of said property as such mortgage interests may appear, then to the lessor and the said lessor subject to the rights of such mortgagees shall have the sole right to receive and collect the same. All of such policies of insurance shall be delivered to and held by the lessor or said mortgagees, and all renewal policies of insurance shall be delivered [fol. 16] to the lessor or said mortgagees at least twenty-four hours before the expiration of the policy to be renewed. It is further agreed that if the lessee, its successors and assigns shall at any time fail or neglect to comply with the covenants herein relating to the procuring of insurance, the lessor, her heirs, executors, administrators or assigns may at her option or their option procure such insurance on the said buildings upon the said leased premises and pay the expense thereof, and the said lessee hereby promises forthwith to repay such expenses to the said lessor, together with interest thereon at the rate of seven per cent per annum, pending such repayment.

Section 12. Insurance Adjustments.—If a fire occurs which only partially damages the said buildings, the lessee shall repair and restore the said buildings to their condition before the fire. If a fire occurs which renders it impracticable to repair or restore the buildings so damaged, then the said lessee shall construct new buildings on said premises, equal in value to the buildings destroyed. If the lessor and lessee cannot agree as to whether the particular damage to the said buildings is so extensive that new buildings should be constructed, or is of such a character that only repairs and restoration shall be made the question should be determined by a board of arbitrators appointed as hereinafter provided. If it becomes necessary to construct new buildings on the said premises, the parties

hereto shall endeavor to agree upon the plans and specifications therefor, and if they fail to agree such plans and specifications shall be such as are approved by a board of arbitrators appointed as hereinafter provided. All such repairs, restorations and construction of new buildings shall be done under the supervision of an architect. [fol. 17] The lessor and lessee shall endeavor to agree upon the appointment of such an architect. If they fail to agree, such architect shall be appointed by a board of three arbitrators as hereinafter provided.

Section 13. Collection and Use of Insurance Money.—Any money paid for indemnity under any of said insurance policies shall be paid to the lessor. The lessor may deduct therefrom and retain for herself any reasonable expenses, if any, including attorney fees incurred in collecting the same and amounts sufficient to pay all rents, taxes, assessments and other payments in respect to the payment of which the lessee shall be in default at the date when the lessor may be called upon to pay any part of the insurance money to the lessor under the terms hereof. The balance shall be available to the lessee for the restoration or the rebuilding of said building, and shall be disbursed by the lessor for said purpose as such work progresses upon certificate of architect that work and material have been furnished, therefor in certain sum, and if any surplus remains after paying for all restoration or rebuilding, the lessor shall pay the excess to the lessee on certificates of the architect showing the facts necessary to entitle the lessee to such payment, and that no liens can be enforced on the buildings or land on which they stand, for the labor or materials used in the buildings at the times the payment is made. Should the lessor fail to pay over to the lessee or its order, any insurance money which the lessee may be entitled to receive under the above provisions, then the lessee may without prejudice to any other right or remedy on its part set off the amount of such insurance money against any installment of rent thereafter to fall due under this lease until such balance shall have — [fol. 18] paid and discharged. The lessor and those holding under her shall not be responsible for the collection or non-collection of any insurance money in any event, but only for such insurance money as shall come to her hand, and no interest shall be payable by or charged to said lessor or those holding under her on any insurance money while in her or their hands, unless payment of the same shall be withheld by unreasonable and vexatious delay.

It is further covenanted and agreed by the parties hereto that all insurance money collected on any and every such policy or policies shall be held and applied as a trust for the purposes aforesaid, provided that in case any building or buildings at any time on said leased premises, in the event of its or their destruction or injury, shall not be completely repaired, restored or rebuilt, then and in any and every such event, all insurance money remaining unexpended in rebuilding or repairing such building or buildings, shall be forfeited to and held by said lessor as liquidated damages hereby

ascertained and agreed upon, and not as a penalty or penal sum, or in the nature thereof, by reason of the breach by the lessee of the covenants of this lease in regard to rebuilding or repairing any such building or buildings, and provided that the lessor shall have the option to enforce such forfeiture or to rely upon and enforce such covenants. In case there should be any delay in the adjustment of the insurance then the time for the repairing or rebuilding of said building or buildings, shall be extended to the extent of such delay, but in no event more than six months.

Section 14. Insurance of Boilers.—It is further covenanted and agreed that all boilers and elevators on said leased premises shall be [fol. 19] insured against accident in some responsible casualty company or companies to be approved by said lessor, in the name of the lessee, by reciting that the loss, if any, shall be payable, first to the mortgagees of the fee of said property as such mortgage interest may appear and then to the lessor, and that in case of damage or destruction of said building or buildings by casualty or accident to said boilers, or elevators in case of damage by casualty to said boilers or elevators, all of the provisions, conditions covenants and agreements or every name and nature herein contained, relating to damage or destruction by fire, shall apply fully in like manner to any damage or destruction by casualty or accident aforesaid.

And the lessee hereby covenants and agrees that it will during the term of this lease, save said lessor harmless from all damages on account of injuries to person, life or property in, on, or about said building or buildings by reason of such damage or destruction by casualty or accident to such boilers and elevators as herein contained and provided.

Section 15. Use and care of Buildings.—Said lessee, covenants and agrees that all buildings or improvements now on the said land or hereafter erected or placed by the lessee upon said leased premises shall remain and stand for security to the lessor for the payment of rent and the performance of the lessee's covenants and agreements hereunder; that no building now on the land or which shall at any time after the execution hereof be erected hereon under the provisions of this lease shall be removed or torn down, nor shall any alterations be made therein, except as herein provided which shall diminish the value thereof without the consent in writing of the said lessor. Also, that any all buildings or building on said leased premises shall be surrendered up in good order and condition to said [fol. 20] lessor on the termination of its lease by forfeiture or expiration of this term subject to the provisions hereof, as hereinafter specified. It is covenanted and agreed by and between the parties hereto that if at any time after a new building in place of the present structure on said leased premises, or any subsequent building has been erected or placed on the said leased premises, the lessee shall desire to demolish the building standing on said leased ground and erect another building in its place it may do so, but only on condition that before so removing the then existing building it shall

either give to the lessor a bond in the penal sum to be fixed by the board of appraisers appointed as hereinafter provided (unless the lessor and lessee can agree upon such penalty) conditioned for the construction in good and workmanlike manner, completion of and full payment for, free and clear from all liens and encumbrances, the proposed new building within eighteen months after the date of commencement of removal of the then existing building, and further conditioned that the proposed new building shall conform to the building ordinances of the City of Detroit, and the regulations of other governmental authorities then in force, and be of the character, and, at least, the value fixed by a board of appraisers as hereinafter provided, unless the lessor and lessee can agree upon such value or shall, in lieu of such bond, deposit with the Detroit Trust Company of Detroit, Michigan or some responsible trust company or bank, then doing business in the City of Detroit, approved by the lessor, in writing, a sum of money fixed by a board of appraisers appointed as hereinafter provided, (unless the lessor and lessee can agree upon such sum) for the construction, completion and payment for, free and clear of all liens and encumbrances whatsoever upon said leased [fol. 21] premises within eighteen months after the date of the commencement of the removal of the then existing buildings, in accordance with the ordinances of the City of Detroit and regulation of other governmental authorities, a building which shall conform in character and be equal to, at least, to the value and requirements as fixed by a board of appraisers as hereinafter provided, unless said lessor and lessee can agree upon such value and requirements. The plans and specifications for any such last mentioned building or buildings, shall be such as are prescribed by a board of appraisers appointed as hereinafter provided, unless the lessor and lessee agree upon the same. Blue prints of plans and copy of specifications at the lessee's cost shall be furnished to the lessor. In the event of such deposit, said trust company or bank may, at the option of the lessee, pay out said deposit, or any part thereof, to complete the new building or buildings to be so constructed, upon architects certificates in the usual manner. All charges of said trust company or bank for its or their services shall be paid by the lessee. In the event that this lease should be terminated by reason of any default on the part of the said lessee while said money, or any part thereof, in this section mentioned shall be on deposit under the provisions hereof as aforesaid, then all of said money, or such part thereof not paid out as aforesaid remaining on deposit, shall belong to and be the property of said lessor, to be delivered by said trust company or bank to said lessor. It is further expressly agreed that all materials of and wreckage from the building or buildings which may be removed, as in this section provided, upon giving such bond or making such deposit shall be taken, used and applied by the lessee without any payment therefor.

[fol. 22] Section 16. Lien of Rent.—It is further expressly agreed and covenanted by and between the parties hereto, that the whole of net rent reserved and hereby agreed to be paid and each and every installment thereof and all taxes, assessments, public charges, governmental charges, water rates, insurance premiums and other charges

herein mentioned and all cost, attorney fees and expenses which may be incurred in enforcing the provisions of this lease on account of any delinquency or failure of the said lessee, its successors or assigns, in carrying out any of the provisions of this lease shall be and be taken, and they are hereby declared to be a valid and first lien upon any and all buildings and improvements which may, during the life of this lease, be erected or placed on said leased premises, and upon the interest of said lessee, its successors or assigns in this lease and in the premises hereby demised, and it is expressly understood and agreed and notice is hereby given that no contract, sale, assignment, mortgage, trust deed, transfer, judgments, mechanics liens, made, created or suffered by the lessee, shall in any manner or degree so affect the title of the said lessor in and to the said demised premises, or her lien for the rent hereunder upon the building and buildings now on, or that may hereafter be erected upon said leased premises, or upon the lessee's interest in this lease; and nothing herein contained shall authorize the lessee to do any act or thing or to make any contracts so as to encumber, in any manner, the title of the lessor, or to create a lien upon the interest of the lessor in said land, leasehold, building, buildings, or improvements, it being expressly understood and agreed that all buildings and improvements hereafter made or erected upon said leased premises by the lessee, shall be promptly [fol. 23] paid for in accordance with the terms of the contract therefor; and that all contracts which may be made for the construction, repairing, or alteration of any building or buildings at any time during the life of this lease on said leased premises, or for any work to be done or materials furnished therefor, shall provide that no liens shall thereby be created or arise thereunder, upon or against the interest of the lessor in said leased premises and said building, buildings or improvements.

Section 17. Liquors.—It is further covenanted and agreed by and between the parties hereto that the said lessee shall not sell or handle any spirituous or intoxicating liquors upon said leased premises. This includes all malt brews. That it will not allow the same to be sold or handled upon said leased premises by any person or persons, corporation or corporations during the terms of this lease, provided, however, that the said leased premises or any part therof may be used for the purposes of a pharmacy or drug store, in which spirituous, malt or intoxicating liquors may be sold or used for medicinal purposes in the usual course of the conduct of said business under the laws of the State of Michigan.

Section 18. Conforming to Ordinances.—It is further covenanted and agreed between the parties hereto that, in the erection of any buildings on the said premises during the term of this lease and in making repairs, improvements or alterations in any of the buildings thereon, the lessee shall at all times conform to the ordinances of the City of Detroit, the laws of the State of Michigan and the requirements of all public authorities relating to the construction of said building or buildings, or any of them relating to improvements, repairs or alterations in and to the said building or buildings, or any

of them, their maintenance and the maintenance of said leased [fol. 24] premises and the sidewalks in front of and in the rear of and adjoining said leased premises, and that it, the said lessee, will not use or suffer or permit any person to use said leased premises, or any building or buildings at any time thereon, for any immoral or improper purposes, or for any purpose or use in violating the laws of the United States, State of Michigan, the ordinances of the City of Detroit, or lawful governmental regulations, and that during said term said leased premises and every part thereof shall be kept by said lessee in a clean and wholesome condition, and generally that all health and police regulations shall in all respects and at all times be fully complied with by said lessee and also that the buildings and improvements upon said leased premises and all the side-walks and areas in front of the same, as well as in the rear thereof, or adjoining thereto, shall be kept by the said lessee, safe, secure, and conformable to the requirements of the said City of Detroit, and all other public authorities, said side-walks shall be kept in good repair and free from snow, rubbish and other obstructions by said lessee, and the said lessor kept harmless and indemnified at all times by the said lessee against any penalty, loss, damage, costs or expenses by respect, or by reason of any accident, loss or damage resulting to person or property by reason of any use which may be made of said leased premises the building or buildings thereon, or by reason of any act or thing done on said leased premises, or the building or buildings thereon, during the term of this lease, or by reason of the tearing down and demolishing of the existing building or buildings now located thereon, or any building or buildings hereafter constructed or placed thereon; also that said lessee will save lessor harmless from all claims by the said City of Detroit, or any other public authority [fol. 25] for compensation or damages by reason of the use or occupations of or intrusion upon any street or alley or part thereof adjoining said leased premises by the said lessee, or anyone occupying said leased premises under said lessee, or in connection with any building now or hereafter situated upon said leased premises. The lessee further covenants and agrees that it will at all times, indemnify and save harmless the said lessor from all penalties and damages arising against the fee or ownership of the fee of said land by reason of improper, immoral, or illegal use of said leased premises, by the lessee, or any person or persons, corporation, or corporations holding under the lease.

Section 19. Sale of Lease.—It is further expressly covenanted and agreed by and between the parties hereto that no sale or assignment of this lease on the lessee's part, or the lessee's interest in the building or buildings, standing upon the said leasehold premises, shall be good or valid, unless,

(a) All ground rents, water taxes, assessments, insurance premiums, governmental charges and other charges, for the payment of which the lessee is by the terms hereof obligated, shall be paid up to the date of such sale or assignment, and all covenants and agree-

ments of the lessee herein fully complied with kept and performed up to such date.

(b) Such sale of assignment shall be evidenced by an instrument in writing signed and acknowledged by the grantor or assignor and assignee or assignees, containing a clause sufficient in law at the time of such sale or assignment to require and obligate the assignee or [fol. 26] assignees, purchaser or purchasers, to personally accept, assume and be bound by all the terms and covenants on the lessee's part to be kept and performed in this lease contained.

(c) Such instrument of sale or assignment shall be duly recorded in the office of the Register of Deeds for Wayne County, Michigan.

It is further expressly covenanted and agreed between the parties hereto, that if any sale or sales, assignment or assignments, of this lease, on the lessee's part, shall be made in compliance with the foregoing requirement as to a valid sale or assignment thereof, and there be standing on said leasehold premises at the time of such sale or assignment, a building which shall have been erected, completed and paid for upon said premises in accordance with the provisions hereof relating to a new building, then the holder of this lease, upon the lessee's part, making any such sale or assignment shall immediately upon the recording of its or their respective assignment, be and be taken to be released and discharged from all the lessee's covenants and agreements in this lease contained, and if any such sale or sales, or assignments in compliance with said requirements as to valid sale or assignment, shall be made prior to the erection, completion and payment for such new building upon said premises, and if thereafter such new building is erected, completed and paid for upon said leased premises in compliance with this lease, then from the time such building is erected completed and paid for, free from all mechanics' liens and other liens whatsoever, the original lessee and all and every person or persons, corporation or corporations holding through or under the original lessee, and who shall have so sold or assigned this lease shall be and be taken to be released and discharged [fol. 27] from all the lessee's covenants and agreements herein.

Section 20. Mortgage on Leasehold Interest.—It is further covenanted and agreed between the parties hereto, that the lessee may at any time and from time to time hereafter mortgage the leasehold interest hereby created in said described premises and his interest in the building thereon for the purpose of securing any bonafide loans of money actually made or about to be made to the lessee, and all such mortgages or trust deeds shall be subject to the rights of the lessor under this lease and all the provisions of this lease; the consent of the lessor to the making of any such mortgage or trust deed shall not be necessary.

Section 21. Default Clause.—Said lessee further covenants and agrees with the lessor that it, the said lessee, will punctually perform all its covenants and agreements herein set forth; that time is of the essence of this contract; that if default shall at any time be made

by the said lessee, its successors or assigns, in the payment of the rent then due as in this lease provided for, for the space of forty days after any installment thereof becomes due and payable as aforesaid, or if default be made in any of the other covenants and agreements herein contained, to be kept, observed, and performed by the lessee, its successors or assigns, and such default shall continue for sixty days after notice thereof in writing to the said lessee, it shall and may be lawful for the lessor, at her election, to declare said term ended, and this lease terminated, cancelled and annulled, and the said leased premises, and the building or buildings and improve-[fol. 28] ments thereon, or any part thereof, either with or without process of law to reenter and the lessee and every other person occupying in or upon the same to expel, remove and put out, using such force as may be necessary in so doing, and the same leased premises again to repossess and enjoy as in her first and former estate. It is expressly agreed that in case of default in the payment of rent no notice thereof to the lessee shall be required in order to entitle the lessor to terminate this lease for such default, but that default for forty days in the payment of any installment of rent hereunder shall, without notice of such default, or demand for such rent, entitle said lessor to terminate this lease. And if at any time said term shall be so ended, terminated and annulled by such election of the lessor or in any other way the said lessee hereby covenants and agrees to surrender and deliver up possession of the said leased premises, together will all buildings, improvements, trade fixtures, lighting and heating plants and elevators then thereon, peaceably to said lessor, immediately upon the termination of said lease as aforesaid, provided that the foregoing provisions for the termination of this lease for any default in any of its covenants shall not operate to exclude or suspend any other remedy of the lessor for breach of said covenants or any of said covenants, or for the recovery of said rent or of any advances of the lessor made on account of this lease; that the lessee shall be and remain responsible for any prior liabilities incurred under the covenants of this lease, and that, until possession of said leased premises is restored or delivered to or regained by the lessor, the lessee shall be and remain liable, at the option of the lessor, either to comply with all the terms of this lease [fol. 29] or to pay the then full rental value of said leased premises from the time of such default until the full actual possession thereof is restored to the lessor. The lessee further covenants and agrees with the lessor that should a receiver or trustee be appointed over or for said lessee, or should the interest of said lessee be sold at judicial sale, and the rents due hereunder not being paid by trustee or receiver, then this lease shall terminate at the option of the lessor.

Section 22. Service of Notices.—It is further expressly agreed that in every case where, under the provision of this lease, it shall or may become necessary or proper for the lessor to give or serve any demand or notice to or upon the lessee, it shall be sufficient: First to deliver or cause to be delivered a written, typewritten or

printed copy of such demand or notice to the lessee for the time being, or by sending a written, typewritten or printed copy of any such demand or notice, by registered mail, with postage prepaid and duly addressed, to the lessee for the time being, at his last post office address known to the lessor, provided however, that in the last mentioned case a copy of such demand or notice shall also be posted on the front door of any building then standing upon leased premises, or upon said leased premises themselves, if at the time of such demand or notice no building be standing thereon. Second: If no service of a copy of such demand or notice can be made upon the lessee for the time being in the manner aforesaid, such demand or notice may be served by posting a written, typewriten or printed copy of the same in some conspicuous place upon said leased premises.

[fol. 30] Section 23. Renewal of Lease.—It is further covenanted and agreed that upon the termination of the time of this lease the lessor shall then have an option either to renew this lease for an additional period of thirty-three (33) years, upon the same terms and conditions as herein contained or to then re-possess said leased premises. In the event of the renewal of this lease for an additional period of thirty-three (33) years, as above provided, the rentals shall be computed on the same basis as herein provided, and the value of the land exclusive of the buildings for the purpose of arriving at the rental thereof, shall be divided into three periods. First period shall be for the first ten years of such renewal, and the second period, the second ten years thereof, and the third period the remaining thirteen years thereof. At the expiration of such renewal period the buildings then standing on the said permises shall become the property of the lessor without compensation therefor to the leasee. If the lessor shall elect not to make such renewal but to re-possess the premises at the end of the original term of thirty-three years, then the lessor shall pay to the lessee as compensation for the buildings then standing on the said premises the reasonable value of such buildings at that time to be determined by arbitrators as herein provided, but not in excess of the present construction cost thereof. If said lessor and lessee cannot first agree as to the value of the said buildings then standing on the said premises. If the lessor shall tender such renewal to lessee at the expiration of said original term of thirty-three (33) years and the lessee shall refuse to accept such renewal said buildings shall become the property of the lessor without compensation. If the [fol. 31] lessee shall at any time forfeit this lease or the renewal thereof by default in the payments or covenants therein provided it shall not be entitled to any compensation for such buildings. If a renewal of this lease is desired by the said lessee, application shall be made in writing to said lessor at least five years prior to the end of this lease. Said renewal shall not be obligatory on the part of the said lessor but it shall be obligatory on the part of the lessee to express the intention or desire to renew such lease. Such intention to be placed in writing and delivered to said lessor on the terms and conditions herein named. In case said lessor and lessee

make a new lease then in that case said lessee shall pay to lessor a guaranty fund on account of the new lease. The amount of the guarantee fund shall be established by lessor at that time. Said lessee shall not have the renewal if it does not put up the proper guarantee fund. This guaranty fund shall be paid at the time the new lease is made provided however, that in event that the mortgage encumbrances against said property to be paid by the lessee shall have been fully paid and discharged that the building or buildings then standing on said property at the end of the term of the lease shall stand as security for the renewal lease in lieu of said guaranty fund. In event however that said mortgage encumbrances shall not have been fully paid and discharged then said guaranty fund shall not exceed twenty per cent (20%) of the then value of said land exclusive of the buildings. A provision of the new lease shall be that the building on the said premises at the time of the expiration of the new lease shall revert to said lessor at the end of the time. It is further covenanted and agreed, by and between the parties hereto, that neither the said lessor nor the said [fol. 32] lessee will sign any petition, consent or any other instrument in writing whereby any person or corporation other than the lessee or those claiming under it shall directly or indirectly acquire the right to use or occupy any portion of the street, avenue or alley upon which said leased premises abuts, or the space above the surface thereof, without the other party hereto joining in such instrument or consenting in writing to the execution, thereof, it being agreed that in all cases where by law the consent or petition of the owner of the property in question is required for the purpose of the public grant, whatever, the joint consent of lessor and lessee in this instrument shall be necessary.

Section 24. Waiving of Rights of Lessor.—It is further agreed and covenanted between the parties hereto that if the lessor shall one or more times waive her right to insist upon the strict letter of any obligation of the lessee hereunder and especially the obligation to pay in gold coin the rent of this lease reserved, no such waiver shall release the lessee in the future from the strict letter of the obligation of paying in said gold coin or any other obligation of this lease and if said lessor shall for any length of time waive her right or rights accruing or belonging to her under the provisions of this instrument, such waiver shall be construed strictly in favor of the lessor, and shall not take from her right to insist upon any rights accruing or belonging to her under this instrument not in writing specifically waived.

Section 25. Lessor Owner of Fee.—The said lessor does for her- [fol. 33] self, her heirs, executors, administrators and assigns, covenant to and with the said lessee, its successors, and assigns that at the ensealing and delivery of this lease she is the lawful owner in fee simple of said demised premises, and that the said lessee on paying the rent hereby reserved and performing the lessee's covenants herein contained shall and may peaceably and quitely have, hold and enjoy the said demised premises.

Section 26. Payment to Lessee for Building.—The lessee hereby covenants and agrees that upon the termination of this lease, and in the event that the lessor does not elect to grant a renewal of this lease for an additional period of thirty-three (33) years as herein provided, that then, and in such case upon the payment to the lessee by the lessor of the then value of the buildings on said premises, as fixed by the board of appraisers hereinbefore mentioned, should said lessor and lessee not first agree, less the amount of any existing mortgage encumbrances against the said property on which the lessee may be liable, that it, the lessee will thereupon surrender and deliver possession of the said leased premises to the lessor.

Section 27. Lawsuits.—Said lessee further covenants and agrees to and with the said lessor, that in case the lessor shall, without any fault on her part, be made party to any litigation commenced by or against said lessee, then the lessee shall and will pay to the said lessor all costs and attorney fees incurred or imposed on the lessor in connection with such litigation, and that the said lessee will also pay all costs and attorney fees which the said lessor shall be subjected to in defending herself in any proceedings brought against [fol.34] her for any delinquency under this lease ascribable to said lessee or in enforcing any of the covenants and agreements or provisions of this lease against said lessee.

Section 28. Arbitrators.—Whenever by the foregoing provision hereof it is stipulated in substance and effect that anything is hereafter to be agreed upon between the lessor and lessee and that in default of such agreement the matter about which they have failed to agree shall be decided by arbitrators, a written request of one of the parties hereto to the other to so agree followed at a reasonable interval by the service by one of the parties hereto upon the other of notice of the appointment of an arbitrator shall be conclusive evidence of such failure to agree, within ten days, it shall be the duty of the party hereto upon whom such service or notice of the appointment of an arbitrator is made, ten days (10) after such service, to appoint her or its arbitrator and serve notice thereof, in writing upon the other party. In default of such appointment, within ten days, the decision of the arbitrator appointed shall be binding upon both of the parties hereto. Such notice of appointment of arbitrators shall specify the name of the arbitrator appointed and the subject to be arbitrated, and all such requests and notices shall be served by registered mail addressed to the party to be served at his last post office address known to the person making the service. If two arbitrators are appointed as hereinbefore provided, they shall, within ten days after the appointment of the arbitrator last to be appointed, agree upon a third arbirtator; and in default of such agreement within ten days, the third arbitrator shall be appointed by the then presiding Judge of the Circuit Court for the County of Wayne on the application of either of the parties hereto. The decision of any two of the three arbitrators *shall* be binding upon the parties hereto.

[fol. 35] Section 29. Purchase of Land.—The said lessee hereby grants and gives to the said lessor an option to purchase from the said

lessee, any right or rights, interests or estate in or to any land (except said demised premises) lying within the territory in the said City of Detroit, Bounded as follows: By Henry St. on the North; that alley on the east; Duffield St. on the South; Clifford St. on the west, which lessee has now or may hereafter acquire from time to time; by paying to the said lessee the cost to the said lessee of such right, rights, interest or estates; such option shall continue for at least six months after the lessee shall have given the lessor notice of the fact that it has acquired such right, rights, interests or estates and of the cost thereof. The understanding being that lessor and lessee shall co-operate in every way to advance their interests and holdings by purchase or otherwise of property in the vicinity of the said leased premises. The lessor agrees to give lessee preference should surrounding or contiguous property be secured by lessor in the future.

Section 30. Mortgages.—At the written request of the lessee the lessor will execute a first and second mortgage on the said leased premises to secure funds for the erection of the proposed building on said leased premises. The first mortgage shall be for five hundred thousand ($500,000.00) Dollars and the second mortgage shall not be in excess of Two Hundred Fifty Thousand ($250,000.00) Dollars. In said mortgages no payment shall be made on principal until March 24, 1924. And said two mortgages anything herein to the contrary notwithstanding, shall be 1st and 2nd liens respectively upon the land and the buildings now or hereafter erected thereon, and upon the interests of both lessor and lessee therein.

[fol. 36] Thereafter, that is after the end of the second year, the said mortgage encumbrances shall be paid off at the rate of not less than Thirty Thousand ($30,000.00) Dollars per year, both of which said mortgages and all interest and charges thereon and fees in connection therewith, shall be fully paid by the lessee. The lessor further agrees to execute such renewal mortgages as may be necessary to extend the time of payment of the principal of such mortgages sufficiently to permit their payment at the rate aforesaid, however, the mortgage encumbrances against said property shall be continually reduced year by year, by the lessee after the second year in an amount not less than Thirty Thousand Dollars ($30,000.00) per year. Such renewal mortgage and fees in connection therewith and any expense thereof shall be fully paid by the lessee.

Upon completion of the said building, a sinking fund shall be provided and maintained by the lessee for the purpose of meeting the payments of principal and interest as provided in said mortgages, and all taxes on said property. In case the payments on said sinking fund be not paid as provided for, then and in that case it shall be considered a just cause of forfeiture of this lease; said sinking fund shall be maintained by the lessee paying in to a joint bank account to be opened in the joint name of the lessor and lessee, a sufficient sum of money each month to establish and maintain such sinking fund for the payment of interest, payments on principal of said mortgages as the same falls due, and taxes, so that the proper time and manner such payments may be paid, such monthly payments shall be nearly as possible equal and shall provide only for the yearly payment on

the principal as the same falls due, and shall not provide for the payment of the principal amount falling due on the last year of said mortgages; it being contemplated that the renewal mortgages will be executed in order to meet the said principal payments falling due [fol. 37] on the last year of said mortgages. This money shall be outside the land rent. Lessor at all times to be permitted to adjust loans so that the lowest rates are secured and the best terms. Loan to be retired as soon as practicable so as to safeguard said lessor's interest in said land. In case any dispute shall arise in reference to said loan appraisers shall be appointed as herein provided. In case said loan or loans so negotiated by said lessee shall be used to provide for furniture or anything else in said building then in that case additional security shall be given said lessor. In event that any of such funds are used to purchase furniture for said building then the foregoing provisions for further security may be satisfied by lessee giving to lessor a chattel mortgage on such furniture until such time as such mortgage encumbrances shall have been reduced by an amount equivalent to the amount of such loans so used for the purchase of such furniture. If said lessor shall take either of said mortgage encumbrances or any renewals thereof then and in such case the lessee shall thereafter pay such mortgage encumbrances as they mature, to the lessor.

Section 31. Waste and Care of Building.—The lessee covenants and agrees to keep the said premises and the buildings thereon clean and in proper shape so as to conserve the interest of the lessor and to keep said buildings in good repair and condition so as not to let them run down, and said premises shall be so kept that lessor's interest is conserved and enhanced, and the security afforded by said buildings shall not be jeopardized; said lessor shall have the right to enter and examine said premises or buildings which may be on the said premises during the life of this lease once in each year or oftener if occasion demands to ascertain and be assured that this provision is fully carried out by the lessee or its assigns. The lessor shall notify the lessee in writing of anything that should be done to make the said premises conform to these requirements, and to all of the re- [fol. 38] quirements of the city ordinances, and other requirements that shall be more sanitary or hygienic or necessary to conform to all the requirements of the building codes of the City of Detroit. The lessee shall thereupon comply with all the reasonable demands made by the lessor, and if compliance is not made within sixty (60) days after the receipt of written notice thereof from the lessor, then in that case the lessor may have the same done, and the cost thereof shall be added to the land rent of the said building and be paid forthwith by the lessee. A violation of this agreement shall be considered just cause of forfeiture of this lease.

Section 32. Execution.—It is further covenanted and agreed that all the covenants, agreements and undertakings in this lease shall be construed as covenants running with the land and that they extend to and become binding upon the respective heirs, successors, executors, administrators and assigns of the respective parties hereto, lessor and

lessee, to the same extent as if the respective successors, heirs, executors, administrators and assigns were named in every instance with the respective parties hereto, to the end that this lease shall always bind said party of the first part, the owner of the fee of the said leased premises and the party of the second part, the owner of the leasehold interest hereby created.

This lease is executed in duplicate.

In witness the above named lessor and lessee hereunto set their hands and seals on the day and year first above mentioned.

Clifford Land Company, by Robert M. Drysdale, Pres.; by Donald F. Gray, Sec. Lavina B. Donaldson. Witness: Samuel J. Lyons, Donald Craig.

[fol. 39] STATE OF MICHIGAN,
County of Wayne, ss:

On this 7th day of April, in the year one thousand nine hundred twenty-two (1922) before me, a Notary Public, in and for the said County, personally appeared Lavina B. Donaldson, to me known to be the same person described in and who executed the foregoing instrument and acknowledged the same to be her free act and deed.

Donald Craig, Notary Public, Wayne County, Mich. My commission expires Dec. 3, 1922.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 7th day of April in the year one thousand nine hundred twenty-two (1922) before me, a Notary Public in and for the said County, appeared Robert M. Drysdale and Donald F. Gray, to me personally known, who being by me duly sworn, did each for himself say that they are respectively the President and Secretary of the Clifford Land Company, the corporation named in and which executed the foregoing instrument, that the seal affixed to the said instrument is the common or corporate seal of the said corporation, and that said instrument was signed and sealed in behalf of the said corporation by authority of its Board of Directors; and the said Robert M. Drysdale and Donald F. Gray did severally acknowledge the said instrument to be the free act and deed of the said corporation.

Donald Craig, Notary Public, Wayne County, Michigan. My commission expires Dec. 3, 1922.

[fol. 40] PLAINTIFF'S EXHIBIT "B" TO BILL OF COMPLAINT

To Clifford Land Company, Robert M. Drysdale, President & Gen. Manager:

You are hereby notified that you are required to quit, surrender and deliver up to me possession of the premises hereinafter described, which you now hold of me as tenant, or pay to me the rent now

due for said premises, for which you are justly indebted to me and which you have neglected to pay.

Said premises are described as follows, to wit; Lots numbered Thirty-three (33) Thirty-four (34) and Thirty-five (35) of the Duffield Subdivision of Park Lots 80 & 81 otherwise known as the Clifford Apartment Building at the northeast corner of Clifford and Duffield Sts., in the City of Detroit, County of Wayne, State of Michigan.

Dated July 6th, 1923.

Luvina B. Donaldson.

[File endorsement omitted.]

[fol. 41] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN

No. 598

REALTY HOLDING COMPANY, Plaintiff,

vs.

LAVINA B. DONALDSON, Defendant

ANSWER AND CROSS-BILL—Filed August 3, 1923

Lavina B. Donaldson, defendant herein, answering the bill of complaint filed herein, says:

1. She admits that she was the owner of the land described in Paragraph I of said bill, subject to a mortgage to Guaranty Trust Company, but denies that foreclosure of said mortgage was threatened or that defendant was financially unable to redeem or that the mortgagee refused to renew or extend said mortgage, and says, that, on the contrary, the mortgagee was willing to renew said mortgage on certain conditions and that defendant could have refunded said mortgage by a new mortgage on said premises from other parties, but did not wish to encumber said premises by a new mortgage while negotiations were in progress for the erection of a building thereon.

2. Defendant denies that she was threatened with the loss of her property or that she enlisted the services of said Drysdale to save said property or that she made any representations or promises to said [fol. 42] Drysdale, except as set forth in the written agreements hereinafter mentioned. Further answering Paragraph II of said bill, she says that, in fact, before the connection of said Drysdale with said premises, she had given one Edward T. Knopke an option to lease said premises and to erect a four-story building thereon; that the lease had been prepared in tentative form, containing substantially the same provisions as the lease attached to said bill of complaint, except for the names of parties, amounts and description

of the proposed building; that said Drysdale purchased said option from said Knopke and procured the consent of defendant to substitute said Drysdale in place of said Knopke and that to obtain defendant's consent to said substitution said Drysdale represented that he would be associated in said lease with one Frank Killam, a practical builder, and one Donald F. Gray who was in position, by family relation, to procure ample financial backing; that thereafter said Drysdale severed connection as to this proposition with said Killam and Gray, and thereby deprived defendant of the practical an financial support which she had expected.

3. Defendant denies that said Drysdale undertook to raise money and erect a building on said premises in pursuance of, or in reliance upon, any representations or promises of said defendant. She denies that said Drysdale discovered that the premises were not adapted to their purpose; she admits that said Drysdale, through his agent, procured an option on the East 43 feet of Lot 35, but denies that he spent a great deal of time or any substantial amount of money in procuring said transfer and denies that the addition of said tract to the property increased the value of the original tract to any con-
[fol. 43] siderable amount; she admits that said Drysdale, through his agent, negotiated a loan for $500,000, secured by a mortgage on said premises, to be used in the construction of said building; she denies that said Drysdale paid the mortgage then existing on said premises.

4. Further answering Paragraph III of said bill, defendant says that the true facts in connection with said transaction are as follows: After procuring defendant's consent to his substitution under the Knopke option, said Drysdale persuaded and induced defendant to consent to a change in the plans, providing for a ten-story building instead of a four-story building theretofore contemplated, and to purchase the East 43 feet of Lot 35 to increase the size of the site for said building. Said Drysdale, through said Frank Killam as his agent, procured an option for the purchase of the said East 43 feet from the owner, one Klein, for $25,000 cash, and also through said Killam as agent, procured plans for the ten-story building and arranged for a loan of $500,000, to be secured by a mortgage on said premises executed by defendant as the owner of the fee, and also by the lessee under the proposed lease; said Drysdale thereupon, with the consent of this defendant, procured the incorporation of the Clifford Land Company under the laws of the State of Michigan, of which said Drysdale was the principal stockholder and officer and said Frank Killam and Donald F. Gray were also intended to be, and as defendant is informed and believes were for a time, stockholders. The lease attached to the bill of complaint and also plans and specifications for the building were then completed and executed, and from the proceeds of said mortgage the Klein property was pur-
[fol. 44] chased and the existing mortgage paid to the Guaranty Trust Company. A second mortgage to the Guaranty Trust Company to the amount of $250,000, to secure a second mortgage bond

issue for the same amount, was also executed and delivered. These mortgages were given in pursuance and fulfilment of Section 30 of said lease, and the disposition of the proceeds was made in accordance with an agreement dated April 7, 1922, between the Clifford Land Company and this defendant, a copy of which is hereto annexed and marked "Exhibit A." Defendant further says that no part of the consideration for the purchase of said Klein property or of the payment of the Guaranty Trust Company mortgage came directly or indirectly from said Drysdale, except as he was interested in the Clifford Land Company, which was one of the mortgagors in said mortgage and the lessee under said lease. This defendant further says that in place of the transfer of the Helen Avenue property mentioned in Paragraph VII of said agreement to said Clifford Land Company, said Helen Avenue property was by subsequent agreement retained by defendant in full payment of rent under the lease to April 1, 1923, and the $10,000 of bonds mentioned in said Paragraph VII were never delivered to this defendant.

5. Defendant denies that any relation of trust and confidence was created whereby it became the duty of this defendant to do anything in connection with said transaction, except to perform the obligations imposed upon her by the lease and supplemental agreement executed by her, but she says that under the terms of said lease and agreements, a relation of trust and confidence was created whereby it became the duty of said Clifford Land Company and said Drysdale to exercise the utmost good faith and diligence to supervise the [fol. 45] execution and carrying out of the contracts for the construction of said building so that the building might be completed strictly in accordance with plans and specifications and at the lowest possible cost, and to manage the rental and operation of said building so as to produce the highest possible net income from said building when completed.

6. This defendant admits the allegations of Paragraphs V and VI of said bill, except that this defendant has no knowledge or information as to the consideration, if any, passing to plaintiff for the execution of said deed and is not interested in the relations between plaintiff and said Clifford Land Company or said Drysdale, and she says that the only relation she ever had with the plaintiff was to accept the deed of the property in question from plaintiff in fulfilment of the greement of said Clifford Land Company to convey said property to defendant.

7. She admits that the Clifford Land Company proceeded to erect on said premises a ten-story fireproof apartment building; she denies that said building is completed, although some parts of said building are ready for lease and occupancy, and she denies that said building, when completed, will be worth $1,250,000, or that said building has increased the equity of this defendant in the land by any amount substantially in excess of the amount paid for said building, and she denies that the increase in value, if any, is due in any considerable degree to expenditures by said Drysdale or said Clifford Land Company or of the plaintiff, and she says that said building, so far

as completed and paid for, has been paid for entirely from the proceeds of the mortgages executed by this defendant and said Clifford Land Company; that substantially all the property and money contributed toward said building came from this defendant and not [fol. 46] from the other parties, and that the other parties have contributed nothing to said building, except services in negotiating the contracts and supervising the work of the contractors. She further says that said Clifford Land Company and said Drysdale, either through bad faith or gross negligence, have permitted the contractor to make changes in the plans and specifications without the consent of this defendant, and to deviate from the plans and specifications, and that by reason of such changes and deviations, the building is worth much less than it would have been if the plans and specifications had been strictly followed, and this defendant is informed and believes that by reason of such changes and deviations, the building now standing on said premises is not worth the amount paid therefor from the proceeds of said mortgages, and that the land and building is not worth more than the amount of the mortgages against it, whereby the defendant, through the wrongful or negligent conduct of said Drysdale and said Clifford Land Company, has lost a large part, if not all, of her equity in said land. She further denies that she has expended no money or effort in the erection of said building and says that, on the contrary, by reason of the default or neglect of said Clifford Land Company, she has been compelled and has expended a considerable amount of money and much time and effort in paying bills and supervising the work on said building, which it was the duty of said Clifford Land Company under its lease to do. This defendant further says that said Drysdale has wrongfully and corruptly received money from the clerk of the works appointed to represent this defendant and the mortgagees in supervising the work of the contractor, and this de- [fol. 47] fendant is informed and believes that said money was received by said Drysdale in pursuance of a corrupt agreement and conspiracy between himself, said clerk of the works and the contractor for the payment by the contractor of money for permission to alter or deviate from the plans and specifications.

8. She denies that the mortgages now on said building are adverse to any interests to which said Drysdale, said Clifford Land Company or this plaintiff are entitled under sail lease and agreements, and says that if said mortgages are in any way adverse to their interests, the fault is entirely their own in arranging said mortgages and presenting them to this defendant for execution on the terms proposed, and she says that said mortgages were presented by said Clifford Land Company and accepted by this defendant as full performance of the agreement in Section 30 of said lease to execute mortgages on said premises; she admits that said Drysdale and Clifford Land Company negotiated for the extension of said loan, but denies that such negotiations were at the instance or request of this defendant or in pursuance of the agreement aforesaid; she admits that said Drysdale claims to have obtained an offer of a loan of $750,000, but she denies that such loan, if made on the

terms proposed, would pay the finance charges of the new loan and all accrued interest, taxes, ground rent and other items, or would enable said Drysdale and said Clifford Land Company to perform all their obligations under said lease and agreements.

9. Further answering Paragraph VIII of said bill, this defendant says that under the terms of said proposed loan, a bonus of 12½% was to be paid, amounting to more than $90,000; that even if the second mortgage bonds could be discounted at $125,000, which de- [fol. 48] fendant is informed and believes could not be done, the proceeds of said loan would still be insufficient to pay the rent, interest, taxes and insurance in default and pay the principal of said first mortgage.

10. She admits that said Drysdale and said Clifford Land Company notified said defendant of the proposed new mortgage and requested her to join therein and that she refused to do so, but she denies that she is under any obligation under said lease to join in said mortgage or that she did so in violation of any undertaking or agreement, or for the purpose of embarrassing them or preventing them from completing their undertakings, and denies that she intended to cheat, wrong or defraud them or to appropriate any rights of theirs to herself.

11. She admits that said Drysdale and said Clifford Land Company served a notice on this defendant of the appointment of an arbitrator "of all matters appertaining to said proposed new loan," but denies that this notice was pursuant to the provisions of said lease or that the proposed arbitration covered any differences other than those affecting the proposed new loan. She admits that she refused to appoint an arbitrator for the purpose specified and says that she so refused for the reason that the question proposed to be arbitrated was not a proper subject of arbitration under said lease; she admits that she caused a notice to be served on said Clifford Land Company to vacate said premises or pay rent past due, but denies that such notice or such refusal to arbitrate violated her lease, or was given in pursuance of any evil design to secure said property for herself. She admits that she intends to attempt to foreclose and forfeit all the rights of said Clifford Land Company and said Drysdale and of the plaintiff in the premises unless they, or some one of them, shall make the [fol. 49] payments and perform the covenants in the lease contained, which this defendant believes she has perfect legal and equitable right to do.

12. She denies that she has hindered or delayed said Clifford Land Company or the plaintiff in said leasing of the premises or in procuring furnishings for the same or in procuring a purchaser for the same, or that she has slandered the title of the Clifford Land Company or offered leases on any part thereof or has negotiated for the furnishing thereof as of her own property; she admits that she has caused her agents and servants to show people through said property and has discussed with various merchants the furnishing of said premises but says that she has done so at the request, and with the

consent, of the Clifford Land Company and for the purpose of co-operating with said Clifford Land Company in furnishing and renting said premises, and that she has at all times recognized and acknowledged the rights of said Clifford Land Company as lessee of said premises. She admits that she caused a sign to be removed from said premises for the reason that she was informed that said sign was placed there for the purpose of selling the interest of this defendant, as well as that of the Clifford Land Company, to which sale she had not agreed; that she caused said sign to be restored immediately on request of said Clifford Land Company and she denies that any of her actions mentioned in Paragraph XI of said bill of complaint were intended to, or did, hamper said Clifford Land Company in carrying out the terms of the lease or that any of such actions of this defendant were contrary to the terms of said lease or to the relationship between herself and the other parties.

13. She denies the allegations of Paragraph XII of said bill.

[fol. 50] 14. She has no knowledge or information, except as contained in this bill, or any assignment by said Drysdale or said Clifford Land Company to the plaintiff of any rights or interests in the premises or any of the agreements pertaining thereto; she denies that such assignment, if made, is valid for the reason that neither said Clifford Land Company nor said Drysdale has any interest whatever in the property, except under the lease aforesaid, and that under the terms of Section 19 of said lease no sale or assignment by the lessee is valid if made while said lessee is in any respect in default under said lease, and said lessee is, and has been for a long time, in default under said lease as hereinafter more fully set forth.

15. This defendant denies that this Court has any jurisdiction in the premises for the reason that the alleged assignment to plaintiff is void under the terms of said lease, and as this defendant is informed and believes, is fraudulent and collusive, was not made for a valuable consideration and was not intended to pass complete title to said lease or to terminate the rights, if any, of said Clifford Land Company and said Drysdale; she further says that this Court has no jurisdiction for the reason that said assignment, even if valid, would not enable the plaintiff under the statutes of the United States to sue on said lease and agreements in connection therewith, on the ground of diversity of citizenship, its assignor, Clifford Land Company, being a Michigan Corporation and a citizen of the same State as defendant, and said bill of complaint sets forth no cause of action on behalf of said plaintiff, except as assignee of said Clifford Land Company and said Robert M. Drysdale, who is also a citizen of the [fol. 51] State of Michigan. This defendant further says that, in so far as plaintiff's claim is based on a relation of trust and confidence between plaintiff's assignor and defendant, said cause of action is not assignable and is not a subject of a bill for specific performance.

This defendant therefore prays that the bill of complaint may be dismissed with costs to this defendant.

Cross-bill

This defendant further claims the benefit of a cross-bill and says:

I. That on July 9, 1923, the Clifford Land Company was in default under the terms of its lease in the following particulars:

1. Said Clifford Land Company had not paid past due rent for the months of April, May, June and July, 1923, amounting to $1,250:

2. Said Clifford Land Company had not paid city taxes for the year 1922, amounting to $1,304.62 and state and county taxes for the year 1922, amounting to $293.56, a total of delinquent taxes amounting to $1,598.18:

3. Said Clifford Land Company had not paid installments of interest on the first mortgage of $500,000, amounting to $36,225;

4. Said Clifford Land Company had not paid the installment of interest on the second mortgage bonds of $250,000 falling due June 15, 1923, amounting to $8,750;

5. Said Clifford Land Company had not paid insurance premiums [fol. 52] falling due November 1, 1922, amounting to $3,903.09;

6. Said Clifford Land Company had not paid various small items of expense advanced by this defendant in connection with said building;

that, by reason of the defaults in interest on said mortgages, said mortgagees are threatening to foreclose said mortgages and to declare the entire principal thereof due and payable forthwith.

II. That because of said default in the payment of rent, this defendant served due notice and demand for payment of rent or vacation of the premises, and on failure of said Clifford Land Company, within seven days after service of such notice, either to pay rent or vacate the premises, this defendant commenced an action before Samuel L. May, Circuit Court Commissioner for Wayne County, Michigan, for recovery of possession of said premises, the trial of which has been prevented by the restraining order of this Court.

III. This defendant further says that the proposed renewal mortgage presented by Clifford Land Company is not in accordance with the terms of said lease, but is inconsistent therewith in the following respects—

(a) Section 30 of the lease provides that the mortgage encumbrances shall be paid off at the rate of not less than $30,000 per year; the proposed mortgage provided for payment of principal in less amount each year;

(b) Section 30 of the lease provides for the execution of such renewal mortgages only "as may be necessary to extend the time of payment of the principal of such mortgages sufficiently to permit

their payment at the rate" of $30,000 per year; the proposed mortgage is not for the purpose of extending the time of payment of principal to an amount within the amount agreed, but for the purpose of providing for all past due payments for which the lessee is personally liable;

[fol. 53] (c) The proposed mortgage includes a bonus to the mortgagee, or to agents, of more than $90,000, to be deducted from the amount of said loan and made a part of the mortgage encumbrance thereon; Section 30 of the lease provides: "Such renewal mortgage and fees in connection therewith and any expense thereof shall be fully paid by the lessee."

(d) Said proposed mortgage is not primarily for the purpose of paying the expense of erecting said building, but is chiefly for the purpose of making payments which said Clifford Land Company is bound to make under said lease, and for failure to make which it is now in default, and such defaulted payments are not within the purpose for which said lease binds this defendant to join in the execution of mortgages.

(e) The proposed mortgage, even if the second mortgage bonds could be discounted for $125,000, would be insufficient to pay the bonus on the proposed new mortgage and the rent, interest, taxes and insurance in default as hereinbefore set forth, and would therefore be of no substantial benefit to any of the parties to the transaction.

IV. This defendant is willing to join in the proposed renewal mortgage if the said Clifford Land Company will pay the bonus for procuring said new mortgage and will provide for the payment of all items in default beyond the amount realized from the proceeds of said mortgage; that said Clifford Land Company has refused to raise any money towards the completion of said building or the payments required of it under said lease, by any other means than mortgages on the premises and rent to be hereafter collected.

V. This defendant further says that said Drysdale representing either said Clifford Land Company or plaintiff, or both, has rented portions of said premises and collected rent therefor in advance, and is attempting to rent other portions of the premises and collect rent therefor in advance, and has avowed the purpose of remaining in possession as long as possible and collecting as much rent as possi-
[fol. 54] ble, without making any payments to this defendant as lessor or to the several mortgagees of said premises, and of delaying the enforcement of this defendant's rights by all possible devices of litigation; that said Drysdale is renting portions of said building unfurnished, whereas said building should be furnished and rented as furnished apartments to get the best results therefrom, which fact has been recognized and admitted by said Drysdale, and that the renting of such apartments unfurnished is in pursuance of the aforesaid scheme to obtain as much immediate rent as possible without regard to the rights of other parties.

This defendant, as cross-plaintiff, therefore prays:

1. That plaintiff Realty Holding Company, as cross-defendant, may answer the portions of this answer contained under the heading "Cross-bill".

2. That said Realty Holding Company may be restrained by the injunction of this court from renting any portion of the premises and collecting rent in advance therefor.

3. That a receiver may be appointed by this Court to take possession of said premises, to rent the same and collect the rent thereof and hold such rent, subject to the order of the Court, for the benefit of the party, or parties, entitled thereto.

4. That said Realty Holding Company be enjoined from interfering with this defendant and cross-plaintiff in any lawful steps she may take to forfeit and terminate said lease for the defaults hereinbefore set forth and to repossess herself of the premises.

5. That this defendant and cross-plaintiff may have such other relief as equity may require.

Lavina B. Donaldson. Miller, Canfield, Paddock & Stone, Attorneys for Defendant and Cross-plaintiff.

[fol. 55] Jurat showing the foregoing was duly sworn to by Donaldson Craig omitted in printing.

[fol. 56] DEFENDANT'S "EXHIBIT" TO ANSWER AND CROSS-BILL

Memorandum of agreement made and entered into in duplicate this 7th day of April, 1922, by and between the Clifford Land Company, a Michigan Corporation, of Detroit, Michigan, as party of the first part, and Lavina B. Donaldson, of the same place, party of the second part, witnesseth:

Whereas the said party of the second part has this day let and leased unto the party of the first part that certain parcel of real-estate situated at the North-East corner of Clifford and Duffield Streets, Detroit, Michigan, and more particularly described as follows, to-wit:

Lots numbered thirty-three (33), thirty-four (34) and thirty-five (35) of Duffield's Subdivision of part of Park lots eighty (80) and eighty-one (81) as shown by the recorded plat thereof, in Liber forty-nine (49) on page 573 of deeds, Wayne County records,

under the terms of a certain written lease bearing even date herewith, and,

Whereas by the terms of said lease the said Clifford Land Company has agreed to construct a ten (10) story building thereon in accordance with the plans and specifications made or to be made by Joseph P. Jogerst, Architect, of Detroit, Michigan, and,

Whereas for the purpose of securing funds for the construction of said building, and for the furnishing of the same, and for the payment of certain outstanding encumbrances against said property, and to provide funds for the purchase price of a portion thereof, both of said parties have joined in two certain mortgages, the first of said [fol. 57] mortgages being to the Detroit Fidelity & Surety Company of Detroit, Michigan, in the amount of Five Hundred Thousand Dollars ($500,000.00) and the second of said mortgages being to the Guaranty Trust Company of Detroit, Michigan, in the amount of Two Hundred Fifty Thousand Dollars ($250,000.00) to secure a second mortgage bond issue for the same amount.

Now therefore in consideration of the premises it is mutually agreed by and between said parties as follows:

(1) The moneys and bonds to be received by and through said two mortgages shall be used solely for the purpose of the construction of said building, and for the payment of bonuses, commission, and fees in connection therewith, and for raising the sum of Fifty-five Thousand Dollars ($55,000.00) with which to pay to the said party of the second part the sum of Thirty Thousand Dollars ($30,000.00), a portion of which is to be used by her in paying a certain outstanding encumbrance on said property amounting to Twenty-six Thousand Dollars ($26,000.00) and Twenty-five Thousand Dollars ($25,000.00) of which is to be used to pay to one Julius Klein for the purchase price of a certain portion of said property, and also the proceeds of said two mortgages may be used in providing for the furnishing of said building.

(2) It is further understood and agreed that in event that sufficient cash can be realized out of first mortgage alone over and above the cost of the construction of said building and the furnishing of the same, and the payment of said sums of money heretofore mentioned, that then and in such case the party of the second part may receive and take from said first mortgage the sum of Twenty-five [fol. 58] Thousand Dollars ($25,000.00) to defray its costs and expenses in and about the financing of said building, the sale of second mortgage bonds for the construction thereof, and for the superintendence of all of the details in connection with the construction of said building, and in the financing thereof by Robert M. Drysdale and Frank W. Killam, both of Detroit, Michigan, and provided said sum or any part thereof cannot be received in cash over and above said costs above mentioned, that then and in that case the party of the second part may receive second mortgage bonds valued at eighty (80) per cent of their par value instead of said Twenty-five Thousand Dollars ($25,000.00) or any part thereof.

(3) It is expressly understood and agreed that no other moneys or bonds shall be used or appropriated from said two mortgages for any other purpose whatsoever without the express written sanction and consent of the party of the second part.

(4) It is further understood and agreed by and between said parties that the moneys and bonds received by and through said two mortgages shall be disbursed and used on the certificate of the Architect having said building in charge, and that the party of the second part shall be furnished at all times with copies of such certificates, and that she shall have free access at all times to all contracts of every kind and description relative to the construction of said building and shall be furnished at all times with the amounts of the contracts let to each trade, so that she may be fully advised at all times as to the amount of money and bonds required to complete the construction of said building and the furnishing thereof and to provide the other funds and expenses hereinbefore set forth, so that at all times she may know the amount of money and bonds remaining on hand and the amount necessary for the completion of said enterprise.

[fol. 59] (5) The party of the first part further agrees by and with the party of the second part to work with her, the party of the second part, to the end that said building shall be constructed and furnished with the least possible expense, consistent with good workmanship and material, and that the interest of the party of the second part shall at all times be conserved.

(6) The party of the second part shall at all times feel at complete liberty to call for any information in connection with the construction or financing of said building and the furnishing thereof, and such information shall be freely and gladly given by the party of the first part.

(7) The party of the first part agrees to secure from Julius Klein a warranty deed of said property owned by him and have said property deeded direct to the party of the second part. The consideration for said deed is to be the sum of Twenty-five Thousand Dollars ($25,000.00), which money is to be raised by and through said two mortgages which are to be repaid by the party of the first part. The party of the second part is to receive an additional Ten Thousand Dollars ($10,000.00) of said second mortgage bonds at their par value, and for which said Ten Thousand Dollars ($10,000.00) in bonds and said property of Julius Klein, she the party of the second part is to turn over and convey to the party of the first part in full payment therefor, the property at the South-west corner of Larned and Helen Avenues, Detroit, Michigan, and known as the Helen Hotel subject to a mortgage encumbrance of Seventeen Thousand Five Hundred Dollars ($17,500.00), together with the furniture and furnishing appertaining thereto.

In witness whereof the parties hereto have set their hands and seals on the day and year first above written.

(Signed) Clifford Land Company, by Robert M. Drysdale, Pres.

[fol. 60] Addenda

All contracts for construction of said building shall be consented to in writing by said Donaldson and all checks for labor or material therefor shall be issued in joint name of said parties.

(Signed) Clifford Land Company, by Robert M. Drysdale, Pres. Lavina B. Donaldson.

[File endorsement omitted.]

[fol. 61] In United States District Court

[Title omitted]

Answer of Plaintiff to Defendant's Cross-bill—Filed August 18, 1923.

The Realty Holding Company, plaintiff herein, answering the cross-bill of defendant herein says:

I. Plaintiff admits that its assignor, the Clifford Land Company, on July 9th, 1923, was nominally in default in the payment of certain items of interest on mortgages and taxes on the said property but that said default was occasioned by the wrongful acts of the defendant set forth in plaintiff's bill of complaint and that had it not been for the wrongful violation of the plaintiff's said lease with defendant on the part of the defendant that there would have been no default in this regard. The items of default are not as stated in said cross-bill but are as follows:

1. Rental from May 15 to August 1st, being three and one half months, amounting to One Thousand Ninety-three and 75/100ths Dollars ($1,093.75).

2. Taxes for the year 1922 amounting to Fifteen Hundred Ninety-eight and 18/100ths Dollars ($1,598.18) have not as yet been paid.

3. The interest in arrears on the first mortgage of $500,000 was not Thirty-six Thousand Two Hundred Twenty-five Dollars ($36,225) but the sum of Seventeen Thousand Five Hundred Dollars ($17,500) and interest thereon at seven per cent, from and after March 25, 1923.

4. Interest on second mortgage of $250,000 falling due June 15, 1923, and amounting to Eight Thousand Seven Hundred and Fifty Dollars ($8,750) was in arrears.

5. No insurance premiums were unpaid and all insurance had been paid in full up to said date.

6. There were no other items of any kind on which plaintiff was in default.

No foreclosure of said mortgages was threatened because of such defaults so far as plaintiff is informed and believes.

II. This defendant admits the allegations contained in Paragraph Two of said cross-bill except that plaintiff alleges that the [fol. 62] said notice was served not because of such default but because of the defendant's evil desire to repossess said property against the rights and equities of the plaintiff.

III. The plaintiff denies that the proposed renewal mortgage presented by the Clifford Land Company is or was not in accordance with the terms of said lease.

(a) The annual payments on principal of said new mortgage were left largely to the decision of plaintiff's assignor and said defendant, but could have been reduced below the sum of Thirty Thousand Dollars ($30,000), but such provision, however, would not have prevented plaintiff from paying at least Thirty Thousand Dollars ($30,000) per year on the principal of said mortgages in accordance with the terms of said lease.

(b) Said proposed new mortgage was not in conflict with Section 30 of said lease, and the plaintiff denies that by the terms of said Section 30 of said lease it was obligated to await the maturity of said mortgage of $500,000 before providing for renewal thereof, but on the contrary thereof alleges that by the terms of said section 30 it had the right to provide for such renewal mortgage prior to the maturity thereof and at such a time when it, the plaintiff, would be in a position to secure such a mortgage and finance the same, especially when the security of the defendant would have been greatly increased thereby.

Plaintiff further alleges that said renewal mortgage was for the purpose of extending the time of payment of the principal of said first mortgage and in so doing that all past due payments and defaults under said lease and on which this defendant was liable could have been liquidated and the defendant's security greatly enhanced thereby.

(c) This plaintiff was in a position to pay the commission demanded for the security of said new mortgage and which amounted to $82,500, that this commission could have been fully paid together with a saving over and above the sum of $25,000 to $40,000 by the plaintiff's being able to purchase its second mortgage bond then outstanding and amounting to $250,000 for substantially $125,000.

(d) Plaintiff denies the allegations contained in Subdivision (d) of Paragraph 3 of said cross-bill.

IV. The plaintiff denies each and all of the allegations contained in Paragraph 4 of said cross bill.

V. This plaintiff admits that it has rented portions of said premises and collected rent therefor in advance and is attempting to rent other portions of said premises and to collect the rent therefor. It

denies that it has avowed the purpose of remaining in possession as long as possible and collecting as much rent as possible without making any payments to defendant or to the other mortgagees of the said premises and the delaying of enforcement of defendant's rights, if any she has, by devices of litigation. Plaintiff admits that it is renting portions of said building unfurnished and admits that said building could be rented to better advantage furnished than unfurnished, and in this regard plaintiff alleges, upon information and belief, that the defendant has sought to embarrass the plaintiff and put it in default by circulating slanderous information about the title of plaintiff with respect to said premises and has purposely sought to prevent furniture dealers from furnishing said premises for the plaintiff in order to keep it, the plaintiff, in default so that defendant may more easily accomplish her evil designs.

[fol. 63] VI. Defendant, through her agents and employees, has admitted that said mortgages should be refinanced by a new mortgage and has admitted that from the proceeds of said proposed new mortgage all commissions for the procuring of same could be paid and the total obligations against said property diminished, but still she obstinately refuses to execute the same or to refinance said properties at all for the plaintiff or to sign any renewal mortgages for the plaintiff at this time notwithstanding the fact that her said lease obligates her so to do.

Realty Holding Company, by Robert M. Drysdale, President.
—— ——, Attorney for Plaintiff and Cross-defendant, 838 Dime Bank Bldg., Detroit, Michigan.

Jurat showing the foregoing was duly sworn to by Robert M. Drysdale omitted in printing.

[File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS

To Realty Holding Company, Plaintiff, and John R. Rood, Attorney for plaintiff:

You will please take notice that the motion of which the attached is a true copy will be brought on for hearing before the Honorable Arthur J. Tuttle in his Court Room in the Federal Building in the City of Detroit, Wayne County, Michigan, on the 13th day of October, A. D. 1923, at 9:30 o'clock A. M. Eastern Standard Time or as soon thereafter as counsel can be heard.

Miller, Canfield, Paddock & Stone, Attorneys for Defendant.
L. B. Gardner, F. L. Dodge, Clark, Emmons, Bryant & Klein, of Counsel.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS CAUSE—Filed October 9, 1923

Comes now, Lavina B. Donaldson, defendant in the above entitled cause by Miller, Canfield, Paddock & Stone, her attorneys, and L. B. Gardner and F. L. Dodge, and Clark, Emmons, Bryant & Klein, of counsel, who appear herein especially for the purpose of this motion and not generally, and moves the Court hereto to dismiss the above entitled cause with costs to defendant herein for her damages in the cause most wrongfully sustained, for the following reasons:

1. That this Court is without jurisdiction of the above cause for the reason that the plaintiff herein is a citizen of the State of Michigan, and is not a citizen of the State of Delaware as in its Bill of Complaint it has alleged; and that this Court does not have jurisdiction of the parties hereto upon the grounds stated in the plaintiff's bill of complaint, namely, the diversity of citizenship of the plaintiff and defendant.

[fol. 66] 2. That this Court does not have jurisdiction of the parties in this cause for the reason that the assignor of the plaintiff herein, Clifford Land Company, being a Michigan corporation and a citizen of the same State of this defendant, the plaintiff herein would have no greater rights than its assignor, the Clifford Land Company, a Michigan Corporation, and therefore there is no diversity of citizenship between the plaintiff and defendant and this court would not have jurisdiction of the parties and cause herein.

3. That this Court does not have jurisdiction of the parties and cause herein for the reason that Section 19 of the lease made between the Clifford Land Company, a Michigan corporation, and the defendant herein, copy of which lease is attached hereto, marked "Exhibit A," and made a part hereof, and to which reference is hereby prayed, expressly provides that no sale or assignment of the lease on the lessee's part or the lessee's interest in the building or buildings upon the said leasehold premises, shall be good or valid unless:

"(a) All ground rents, water taxes, assessments, insurance premiums, govermental charges and other charges, for the payment of which the lessee is by the terms hereof obligated, shall be paid up to the date of such sale or assignment, and all covenants and agreements of the lessee herein fully complied with kept and performed up to such date."

That the lease, if assigned by the Clifford Land Company to the plaintiff herein as is alleged in the plaintiff's Bill of Complaint, is not a valid assignment and the plaintiff takes nothing under such assignment and the plaintiff herein cannot therefore be per-

mitted to come into this Court and maintain this suit, as an assignee of the lessee's interest in said lease.

4. That this Court does not have jurisdiction of the parties and cause herein for the reason that the plaintiff herein was not at the [fol. 67] time of taking of the claimed assignment of the Clifford Land Company's interest in the lease between defendant herein and the Clifford Land Company, a corporation of the State of Delaware or any other State, its charter having been forfeited by the State of Delaware, and was forfeited at the time that it took the claimed assignment of the lease from the Clifford Land Company, a Michigan Corporation; that its charter was forfeited at the time it filed the above suit in this Court, and that it had no power or authority whatsoever to sue as it alleged it did sue, as a corporation of the State of Delaware.

5. That this Court is without jurisdiction of the parties and cause for the reason that at the time the plaintiff herein took the claimed assignment of lease from the Clifford Land Company, a Michigan Corporation, and at the time it filed suit in this Court, it was not a corporation of the State of Delaware, or of the State of Michigan, or of any other State; that the plaintiff's charter was never legally authorized under the statutes of the State of Delaware for the reason that no capital stock in fact was paid in by its so-called organizers; that while its Articles of Association state that ten shares of the capital stock was subscribed for and fully paid in, in fact and in truth there was no money or property paid into the corporation; that the officers elected were merely for the purpose of giving color to a corporation claiming to be a legally organized corporation, when in truth and in fact, such company was not legally organized; that while the names of the officers were used to complete the formalities of the law, they were never intended, nor did they ever function for said organization in carrying out the alleged purpose of the corporation; that immediately after said Articles of Incorporation were filed with the Secretary of State in [fol. 68] the State of Delaware, the following officers, viz; Robert M. Drysdale, President, John F. Linehan, Secretary, all residents of the State of Michigan, purport to have been elected to take their places. That on October 31, 1921, a certified copy of the Articles of Incorporation of the Delaware corporation, so-called, were filed with the Secretary of the State of Michigan; that no money or property was turned over to the corporation on its filing of said certified copy of the Articles of Incorporation with the Secretary of State for the State of Michigan.

6. That this Court does not have jurisdiction of the parties and the cause herein for the reason that plaintiff took or attempted to take the claimed assignment of the lease, copy of which is attached hereto, marked "Exhibit A," and made a part hereof, from the Clifford Land Company, a Michigan corporation for the sole purpose of attempting to give this Court jurisdiction of the cause and parties herein, and for the sole purpose of taking away the jurisdic-

tion of the Courts of the State of Michigan, and for no other reason; that the charter of the plaintiff was at the time of the taking of the claimed assignment of lease and at the time of the institution of this suit, forfeited by the State of Delaware for the non-payment of taxes; that the order for re-instatement of the charter of the said corporation was made after the taking of the claimed assignment of lease and the institution of this suit, by the plaintiff and was made for the express and only purpose of depriving the State Courts of Michigan of the jurisdiction of the causes then before the Circuit Court for Wayne County in which Lavina B. Donaldson was plaintiff and Clifford Land Company was defendant, and the case before Circuit Court Commissioner May for Wayne County, Michigan, in which Lavina B. Donaldson was plaintiff and the Clifford Land Company was defendant.

7. That this Court is without jurisdiction of the parties and cause herein for the reason that at the time the plaintiff took the claimed [fol. 69] assignment of lease, it had a branch office in the State of Michigan, and was doing business in the State of Michigan, without having complied with the Statutes of the State of Michigan under which a foreign corporation is permitted to do business in this State; that the claimed assignment taken by this plaintiff from the Clifford Land Company was therefore void, and the plaintiff has no place in this Court and cannot sue to protect its claimed rights in regard to said lease in this court.

8. That this Court is without jurisdiction of the parties and cause herein for the reason that at the time the plaintiff took the claimed assignment of lease from the Clifford Land Company, a Michigan corporation, and at the time that it instituted this suit, it was not a corporation of the State of Delaware, of the State of Michigan, or of any other State; that its charter had been forfeited and that the order re-instating its charter was not signed until after the taking of the claimed assignment of lease and the institution of this suit, and that its charter has never been re-instated in the State of Michigan.

This motion is based upon the files and records in this cause, upon the pleadings filed in this cause, upon the lease made between Lavina B. Donaldson as lessor and Clifford Land Company, a Michigan corporation, as lessee, dated March 31, 1922, copy of which is attached hereto, marked "Exhibit A," and made a part hereof, upon the Petition in the State of Delaware of the Realty Holding Company for re-instatement of its charter, upon the Certificate of Reinstatement, upon the affidavit of Robert M. Drysdale attached to said petition for re-instatement, upon the Order of S. D. Townsend, Jr., Attorney General for the State of Delaware, upon the Order of Wm. D. Denney, Governor of the State of Delaware granting said petition for re-instatement, upon the Certification by the Secretary of State of the State of Delaware, copies of which are attached hereto, marked "Exhibits B," and made a part hereof; and upon the affidavits of L. B. Gardner, and Lavina B. Donaldson,

[fol. 70] attached hereto and made a part hereof, and maked "Exhibits "C" and "D," respectively.

(Sgd.) Miller, Canfield, Paddock & Stone Attorneys for Defendant. (Sgd.) L. B. Gardner, (Sgd.) L. F. Dodge, (Sgd.) Clark, Emons, Bryant & Klein, Of Counsel.

[File endorsement omitted.]

[fol. 71] DEFENDANT'S EXHIBIT "A"

(Same as Plaintiff's Exhibit "A" attached to Bill of Complaint.)

[fol. 72] DEFENDANT'S "EXHIBIT B" TO MOTION TO DISMISS

Petition for Reinstatement

To His Execllency the Governor of the State of Delaware:

The petition of Realty Holding Company, a corporation created by and existing under the laws of the State of Delaware respectfuly represents:

That your petitioner is a Corporation created by and existing under the laws of the State of Delaware, whereunder it was incorporated on the — day of ——, A. D. ——, with an authorized capital stock of —.

That the Charter of the Petitioner has become inoperative and void by operation of law for non-payment of tax due to the State, said taxes due to the State being as follows, to wit:

Franchise tax for year 1920 due March 15, 1921	$57.29
Penalty	13.75
Franchise Tax for year 1921 due March 1922	36.24
Penalty	4.35
Tax for the year 1922 due March 1923	20.00
	131.63

That the company is now desirous of securing a reinstatement of its rights and franchises under its charter for the purpose of resuming active business, and is ready and willing to pay the taxes due the State as hereinabove set forth, and that it has every reason to believe that if the charter of said Company is reinstated, that it will in all probability maintain its corporate existence under the Laws of the State of Delaware for many years, and that the business of the company will be such as will enable it to pay its future taxes to the State [fol. 73] of Delaware promptly from year to year as they may become due.

Wherefore, your petitioner prays that your Excellency by and with the advice of the Attorney General of the State of Delaware, do permit said Corporation to be re-instated and entitled to all its franchises and privileges in order that the secretary of State of Delaware may issue his Certificate entitling the said Realty Holding Company to continue its business and franchises.

And your petitioner will ever pray.

Realty Holding Company, by Robert M. Drysdale, President.
(Corporate Seal Realty Holding Company, Delaware.)

Detroit, Mich.

[fol. 74] EXHIBIT B CONTINUED

STATE OF MICHIGAN,
County of Wayne, ss:

Be it remembered, that on this 12th day of July, A. D. 1923, personally appeared before me, the subscriber, a Notary Public of the State and County aforesaid, Robert M. Drysdale, President of the Realty Holding Company, a corporation created by and existing under the laws of the State of Delaware, who being by me duly sworn, according to law, doth depose and say that he is the President of the Realty Holding Company, the Petitioner above named, and that the facts stated in the foregoing petition so far as the same relate to the Act and Deed of any person, he believes the same to be true.

Robert M. Drysdale, President.

Sworn and subscribed to before me the day and year aforesaid. Grace Geary, Notary Public. My com. exp. Feb. 7, 1927. (Notary Seal Grace Geary, Wayne County, Michigan.)

[fol. 75] EXHIBIT B CONTINUED

Certificate of Reinstatement

To all to whom these presents may come, Greeting:

Whereas, the Charter of Realty Holding Company, has become inoperative and void by operation of law for non-payment of taxes;

And Whereas the aforesaid Company has filed in this office satisfactory reasons for the non-payment of the taxes aforesaid, and has paid to the Secretary of State the sum of One Hundred and thirty-one Dollars and sixty-three cents, the State Tax requited upon filing this certificate, in the judgment of the Governor and Attorney General as an equitable sum to be paid by said Corporation, according to the provisions of Section 81, Chapter 6, of the Revised Stat-es of 1915.

Now, therefore, I, A. R. Benson, Secretary of State of the State of Delaware, do hereby certify that the Realty Holding Company, is hereby re-instated as a corporation, and is entitled to all its franchises and privileges contained in its original Certificate of Incorporation, and has full power and authority under the laws of this State to continue its said business and its said franchises.

In testimony whereof, I, have hereunto set my hand and official seal, at Dover, this eighteenth day of July, in the year of our Lord one thousand nine hundred and twenty-three.

A. R. Benson, Secretary of State.

Secretary's office, Dover, Delaware.

[fol. 76] EXHIBIT B CONTINUED

To the Honorable John C. Townsend, Jr., Governor of Delaware:

I have read the foregoing Petition of the Realty Holding Company for reinstatement. I understand that the amount of taxes and penalties now due by the said Company to the State of Delaware is the sum of One Hundred Thirty One Dollars and sixty three cents ($131.63). I hereby advise you that in my judgment the amount in lieu of taxes and penalties the said Company should pay prior to its reinstatement, shall be the sum of One Hundred Thirty One Dollars and Sixty Three Cents and upon such payment said corporation shall be reinstated and entitled to all its franchises and privileges and be furnished with a certificate entitling such corporation to continue its said business and its said franchises in accordance with the provisions of the Statutes in such cases made and provided.

S. D. Townsend, Jr., Attorney General.

[fol. 77] EXHIBIT "B" CONTINUED

And now, to wit, this 18th day of July, A. D. 1923, the foregoing Petition having been presented, read and considered by the Governor and it appearing to the Governor by and with the advice of the Attorney General of the State of Delaware, that the same *shown* proper ground for the exercise of the discretion lodged with the Governor by and with the advice of the Attorney General under 118, Sec. 81, Chapter 6, Revised Statutes 1915, and all acts amendatory thereof and supplemental thereto, it is hereby ordered by the Governor, by and with the advice of the Attorney General that upon the payment by the said Realty Holding Company to the Secretary of State of the State of Delaware, the sum of One hundred and thirty-one dollars and sixty-three cents in lieu of the taxes and penalties due from the said Realty Holding Company, shall be entitled to all its franchises and privileges, subject, however, to the pro-

visions of the laws of the State of Delaware in such cases made and provided.

Wm. D. Denny, Governor of the State of Delaware.

[fol. 78] EXHIBIT B CONTINUED

State of Deleware,

Office of Secretary of State

I, A. R. Benson, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Reinstatement of the Realty Holding Company, as received and filed in this office the eighteenth day of July, A. D. 1923 at 9 o'clock A. M.

In testimony whereof, I have hereunto set my hand and official seal at Dover, this tenth day of September, in the year of our Lord one thousand nine hundred and twenty-three.

A. R. Benson, Secretary of State. (Seal.)

[fol. 79] DEFENDANT'S EXHIBIT "C" TO MOTION TO DISCUSS.

UNITED STATES OF AMERICA:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

In Equity. No. 598

REALTY HOLDING COMPANY, Plaintiff,

vs.

LAVINA B. DONALDSON, Defendant

COUNTY OF INGHAM, ss:

L. B. Gardner of the City of Lansing, Ingham County, State of Michigan, being duly sworn, deposes and says, as follows:

1. That the Realty Holding Company is a foreign corporation, so-called, purporting to have been organized under the laws of the State of Delaware in the City of Wilmington, Delaware, on the 5th day of March, 1920.

2. That the Realty Holding Company never was legally authorized in the State of Delawars for the reason that no capital stock, in fact, was paid in by its so-called organizers. That while the Articles of Incorporation state that ten shares of the capitol stock was sub-

scribed for and fully paid in, in truth and in fact, there was no money or property paid into the corporation.

3. That he is informed which information he believes to be true and therefore say that the officers elected were merely for the purpose of giving color to a company claiming to be a legally organized corporation, when in truth and in fact such company was not legally organized.

[fol. 80] 4. That he is informed, which information he believes to be true and therefore says that while the names of said officers were used to complete the formalities of the law they were never intended to, nor did they ever function with said organization in carrying out the alleged purposes of the corporation.

5. That immediately after said Articles of Incorporation were filed with the Secretary of State, in the State of Delaware, the following officers, viz: Robert M. Drysdale, President, John F. Linehan, Secretary, all residents of the State of Michigan, purport to have been elected to take their place.

6. That on October 31, 1921, a certified copy of the Articles of Incorporation of the Delaware corporation, so-called, were filed with the Secretary of State for the State of Michigan.

7. That he is informed, which information he believes to be true and therefore says that no money or property was turned over to the corporation on its filing of the said certified copy of the Articles of Incorporation with the Secretary of State for the State of Michigan.

8. That the Realty Holding Company was never authorized by the Secretary of State for the State of Michigan, to transact business in this State.

9. That on or about the 12th day of July, 1923, said Robert M. Drysdale for the purpose of depriving the State Courts of the jurisdiction of the subject-matter in controversy between the respective parties in this cause, prepared and swore to a petition setting forth that the charter of the Delaware Corporation so-called, of the petitioner (Robert M. Drysdale) has become inoperative and void by operation of law, for non-payment of taxes due to the State, said taxes due to the State being as follows:

[fol. 81] Franchise taxes for the year 1920, due March 15, 1921	$57.29
Penalty	13.75
Franchise taxes for year 1921, due March, 1922	26.34
Penalty	4.35
Taxes for the year 1922, due March 1923	20.00

10. That on the 18th day of July, 1923, the Governor of the State of Delaware ordered, among other things, "that upon the payment by the said Realty Holding Company, to the Secretary of State of

the State of Delaware, the sum of $131.63 in lieu of the taxes and penalties from the said Realty Holding Company shall be entitled to all its franchises and privileges subject, however to the provisions of the law of the State of Delaware in such case made and provided."

11. That on the 18th day of July, 1923, the Secretary of State for the State of Delaware reinstated said corporation.

12. That a copy of said petition made by said Robert M. Drysdale together with all of the various steps thereunder are attached to the Motion made in this cause, marked "Exhibit B".

13. That no steps whatsoever have been taken by said Realty Holding Company or any person in its behalf to have its corporate existence, if any, reinstated in the State of Michigan.

14. That if said Realty Holding Company was duly and legally organized in the State of Delaware and thereafter a certified copy of the Articles of Incorporation, were filed with the Secretary of State of the State of Michigan, and in virtue thereof was entitled to function in the State as a corporation and thereafter continued to be a legally organized body and capable of functioning as such in this State at the time of filing said bill, then said corporation was a domesticated organization with power, within this State to sue and be sued in any Court of law or equity, with the same rights and obligations as a natural person. And as a domesticated corporation, for jurisdictional purposes, its local existence, citus, or domicile in [fol. 82] a business and corporate sense was in the City of Detroit and as such the State Court have full power, authority and jurisdiction over the parties and subject-matter in this case to adjudicate and determine all questions between said parties.

L. B. Gardner.

Subscribed and sworn to before me this 22nd day of October, A. D. 1923. Willis O. Dodge, Notary Public, Ingham County, Michigan. My commission expires March 14, 1924.

[File endorsement omitted.]

[fol. 83] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STRIKE—Filed December 12, 1923

Now comes the Realty Holding Company, plaintiff in the above entitled cause by John R. Rood, its attorney, and moves the court to strike from the files in said cause the motion made by the defend-

ant (and first noticed for hearing October 13th, A. D. 1923) to dismiss the bill of complaint filed in this cause.

The grounds of this motion are as follows:

(1) That the said motion is an attempt to re-argue the motion made by the defendant contained in her answer, and heretofore heard and denied by this court on the merits:

(2) That the said motion is made and filed after the filing of the answer of the defendant, without obtaining permission from the court to file the same; and, containing matter not contained in the answer:

(3) That the case is at issue on Defendant's Cross-bill;

(4) That the said motion is frivolous.

Dated this 23rd day of October, A. D. 1923.

John R. Rood, Attorney for the Plaintiff.

To Miller, Canfield, Paddock & Stone, attorneys for the defendant:

Take notice that a motion of which the foregoing is a true copy and will be brought on for hearing before the said court on Friday, the 2nd day of October, A. D. 1923, at the opening of court or as soon thereafter as counsel can be heard.

Dated this 23rd day of October, A. D. 1923.

John R. Rood, Attorney for the plaintiff, 838 Dime Bank Bldg., Detroit, Michigan.

[File endorsement omitted.]

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed Dec. 12, 1923

TUTTLE, District Judge: This case is before the Court on a motion by defendant to dismiss the bill of complaint for reasons which include asserted absence of jurisdiction in this Court. The only ground of jurisdiction invoked by plaintiff is that based on alleged diversity of citizenship.

The bill avers that plaintiff is a Delaware corporation and that defendant is a resident of Detroit, Michigan, within this district. Plaintiff seeks in its bill to enforce specific performance of a thirty-three year lease of certain premises located in said city of Detroit, which lease is alleged in the bill to have been granted by defendant to the Clifford Land Company, a Michigan corporation, and to have been thereafter assigned by the lessee named to the plaintiff. The

suit is not claimed by plaintiff to be, and clearly is not, a proceeding in rem, but is a suit to recover rights and to obtain relief in personam against the defendant. A copy of said lease is attached to the bill and by reference made a part thereof, and various violations [fol. 85] of such lease are alleged and complained of as the substantial basis for the relief sought. The main object of the suit is the enforcement of the terms and provisions of this lease.

After filing an answer on the merits and a counter-claim (designated therein as a "cross-bill" in apparent disregard of the language of Equity Rule 30), asking that plaintiff be enjoined from interference with the claimed right of defendant to terminate said lease, defendant filed the motion to dismiss already referred to.

Plaintiff has filed a motion to strike from the files the motion to dismiss the bill, urging that defendant is not now in position to object for the first time to the jurisdiction of the Court. This contention is plainly without merit. It is elementary law that the jurisdiction of a federal court over a cause pending therein must affirmatively appear from the pleadings or record in such cause and that the absence of a showing of such jurisdiction not only may be brought to the attention of the court at any stage of the proceedings, but will be noticed, with resultant dismissal of the suit, by the court on its own motion even against the protests of the parties. Morris vs. Gilmer, 129 U. S. 315; Thomas vs. Board of Trustees, 195 U. S. 207; Chicago, Burlington & Quincy Railway Co., vs. Willard, 220 U. S. 413; Utah-Nevada Company vs. De Lamar, 133 Fed. 113 (C. C. A. 9). Indeed, Section 37 of the Judicial Code expressly provides that "if in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no further therein, but shall dismiss the suit."

[fol. 86] The first subdivision of section 24 of the Judicial Code provides, among other things, as follows: "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court to recover upon said note on other chose in action if no assignment had been made." The lease involved herein is such a chose in action. Bradley vs. Hunt, 8 Wall. 393; Republic Mining Co. vs. Jones, 37 Fed. 721; Brooks vs. Laurent, 98 Fed. 65 (C. C. A. 5). A suit to enforce specific performance of a contract (even if such contract relate to real estate) is a suit to recover upon a chose in action within the meaning of the statute just quoted. Corbin vs. Black Hawk Co., 105 U. S. 659; Shoecraft vs. Bloxham, 124 U. S. 730; Plant Investment Co. vs. Jacksonville, Tampa & Key West Railway Co., 152 U. S. 71; State of Maine Lumber Co. vs. Kingfield Co., 218 Fed. 902. The fact that the main object of the present suit is the specific performance of the lease in question indicates the character of such suit as one to recover upon a chose in action and

therefore within the provisions of said statute. Kolze vs. Hoadley, 200 U. S. 76. As, therefore, it appears that the assignor of said chose in action and the defendant are citizens of the same state, it is plain that this suit could not have been prosecuted in this court if the assignment mentioned had not been made. It follows that the motion to dismiss the bill must be granted.

It should perhaps be remarked that while the bill does not specifically allege that defendant is a citizen of Michigan, yet no objection on that ground has been raised by defendant and it is apparently undisputed and conceded that the defendant is a citizen of that state, and the matter has been disposed of on such assumption. This [fol. 87] assumption, of course, does not prejudice plaintiff, as otherwise its bill should be dismissed for lack of allegation of any diversity of citizenship between the parties.

Arthur J. Tuttle, District Judge.

Detroit, Mich., December 12th, 1923.

[File endorsement omitted.]

[fol. 88] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE DISSOLVING RESTRAINING ORDER AND DISMISSING BILL—December 12, 1923

In this cause motion to dismiss Bill of Complaint heretofore filed herein, having been on November 26th, A. D., 1923, duly argued and submitted with leave to file briefs, and the court having carefully read and considered the briefs filed, and being fully advised in the premises does now here

Order, adjudge and decree that the restraining order heretofore made and entered on the seventh day of August, A. D., 1923, be, and the same is, hereby vacated and set aside, and the bill of complaint herein dismissed, in accordance with the written opinion this day filed herein. Formal decree herein to be settled, signed and entered hereafter, if counsel be so advised.

Arthur J. Tuttle, United States District Judge.

[fol. 89] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed December 4, 1923

The above named plaintiff, Realty Holding Company, a corporation organized and existing under the laws of the State of Delaware,

having dismissed the appeal heretofore taken to the Circuit Court of Appeals of the United States for the Sixth Circuit, because the sole ground of decision in the District Court was lack of jurisdiction; and the said plaintiff, Realty Holding Company, still conceiving itself aggrieved by the order entered in the above entitled cause, December 12, 1923, dismissing the plaintiff's bill of complaint, the said plaintiff does hereby appeal from the said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herein and herewith; and the plaintiff prays that the said appeal may be allowed and that a citation may issue as provided by law, and that a transcript of the record proceedings, papers and exhibits upon which such order was made and [fol. 90] entered, so far as necessary to show the jurisdictional question involved, as said in the præcipe to be filed with the Clerk of said District Court and duly authenticated, may be sent to the Supreme Court of the United States.

Realty Holding Company, by John R. Rood, Solicitor and Attorney for the Plaintiff.

[File endorsement omitted.]

[fol. 91] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERRORS—Filed December 14, 1923

Now comes the plaintiff in the above entitled cause, by John R. Rood, its solicitor and attorney, and hereby assigns the following errors upon which it relies, and will rely on appeal, and it says that the order entered in the said cause December 12th, 1923, dismissing the plaintiff's bill of complaint, is erroneous, unjust and prejudicial against the rights of the plaintiff for the following reasons:

(1) The Court erred in said order of December 12th, 1923, in ordering the plaintiff's bill dismissed because there was no jurisdiction; every essential thereto appearing on the face of the papers on file in said cause.

(2) The Court erred in holding that this is a suit for specific performance and not a proceeding in rem.

(3) The Court erred in holding that the plaintiff's suit was an action upon and that the plaintiff an assignee of a chose in action merely as distinguished from an owner of real estate and suing to protect such estate from threatened invasion.

(4) The Court erred in the decree dismissing the plaintiff's suit for want of jurisdiction.

Realty Holding Company, by John R. Rood, Solicitor and Attorney for Plaintiff.

[fol. 92] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed December 14, 1923

This cause coming on to be heard on the petition of the plaintiff to be permitted to appeal from the order entered in said cause, December 12, 1923, to the Supreme Court of the United States, and it appearing that the former appeal taken inadvertantly in this cause to the Circuit Court of Appeals for the Sixth Circuit has been withdrawn and dismissed, and it further appearing that this petition is now made to a Judge of a Circuit Court for the Sixth Circuit, under the provisions of Rule 36 of the Rules of the Supreme Court of the United States; and upon argument of counsel for the plaintiff and upon due consideration thereof,

It is ordered that an appeal to the Supreme Court of the United States from the order of said court entered in said cause December 12, 1923, be and the same is hereby allowed, and it is hereby ordered that so much of a transcript herein as is necessary and essential to the proper presentation thereof, be forthwith remitted to the Supreme Court of the United States; and it is further ordered that a bond on appeal in this cause be and the same is hereby fixed at the sum of Two Hundred and Fifty Dollars ($250.00), the same to serve as bond for cost on appeal.

A. C. Denison, Circuit Judge of the United States for the Sixth Circuit.

[File endorsement omitted.]

[fol. 93] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed January 19, 1923

To Miller, Canfield, Paddock & Stone, solicitors for defendant Lavina B. Donaldson:

Please take notice that the plaintiff, Realty Holding Company, has appealed from the order in the above entitled cause of the District Court of the United States for the Eastern District of Michigan, Southern Division, dismissing the plaintiff's bill of complaint, that the bond on appeal and bond to continue the injunction pending appeal have been duly executed and filed pursuant to the order of the said court and the assignment of errors heretofore served upon you together with the petition for appeal and that the accompanying

præcipe contains a complete list of the papers and records which the plaintiff and appellant expects to include in the printed record.

Dated this 18th day of January, A. D. 1924.

John R. Rood, Solicitor and Attorney for Plaintiff and Appellant.

Received the foregoing notice and accompanying præcipe this 18th day of January, A. D. 1924. Also copies of bond on appeal and bond to continue injunction pending appeal.

Miller, Canfield, Paddock & Stone, by John C. Spaulding, Attorneys and Solicitors for Defendant Lavina B. Donaldson.

[File endorsement omitted.]

[fol. 94] THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, D. C.

CITATION IN USUAL FORM SHOWING SERVICE ON MILLER, CANFIELD, PADDOCK & STONE—Omitted in printing

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[fol. 95] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFF'S PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed January 19, 1924.

To Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division.

DEAR SIR: In accordance with Equity Rule 75 and the order of the court entered herein, you are requested to prepare and forward to the Clerk of the Supreme Court of the United States, a transcript of the record in the above entitled cause for use in connection with the appeal from the order of the said District Court; entered in said cause on the 12th day of December, A. D. 1923, and you are requested to include in said transcript the following pleadings, proceedings, orders and papers:

(1) The bill of complaint, filed in said cause July 17, A. D. 1923.

(2) The answer and cross bill of Lavina B. Donaldson, filed in said cause August 3, A. D. 1923.

(3) Plaintiff's answer to the defendant's cross bill, filed in said cause August 18, A. D. 1923.

(4) The motion to dismiss the bill of complaint, filed October 9, A. D. 1923, without the appended affidavits and exhibits.

(5) Plaintiff's motion to strike the above motion from the files, filed in said cause October 23, A. D. 1923.

(6) The opinion of the court, filed in said cause December 12, A. D. 1923.

(7) The order and decree of the court dismissing the bill of complaint, filed December 12, A. D. 1923.

(8) The petition for appeal to the Supreme Court of the United States, filed in said cause December 14, A. D. 1923.

(9) The assignment of errors, filed in said cause December 14, A. D. 1923.

(10) The order of Hon. Arthur C. Denison, Circuit Judge, allow-
[fol. 96] ing said appeal, signed and filed December 14, A. D. 1923.

(11) Notice of Appeal filed January 18, A. D. 1924.

(12) Citation to the defendant to appear in the Supreme Court of the United States.

(13) This Præcipe.

The transcript to be prepared as requested by law and the Rules of the United States Supreme Court and the District Court of the United States for the Eastern District of Michigan, Southern Division, and to be filed with the clerk of the Supreme Court of the United States at Washington on or before the 16th day of February, A. D. 1924.

John R. Rood, Solicitor and Attorney for Plaintiff and Appellant.

Service of the foregoing præcipe by receipt of copy this 18 day of January, A. D. 1924, is hereby acknowledged.

Miller, Canfield, Paddock & Stone, by John C. Spaulding, Solicitors and Attorneys for defendant Lavina B. Donaldson.

[File endorsement omitted.]

[fol. 97] IN UNITED STATES DISTRICT COURT.

[Title omitted]

DEFENDANT'S PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed February 4, 1924.

To the Clerk of said Court:

Please insert in the record to be transmitted to the Supreme Court of the United States on appeal the following papers in addition to those included in complainant's præcipe.

Exhibits attached to Defendant's Motion to Dismiss.

Miller, Canfield, Paddock & Stone, Solicitors for Defendant

[File endorsement omitted.]

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME

Upon the application of the Clerk of this court, for cause shown it is by the Court now here ordered that the time in which to file and docket printed record on Appeal in this cause be and the same is hereby extended to and including the 18th day of March A. D. 1924.

Charles C. Simons, United States District Judge

[fol. 99] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

EASTERN DISTRICT OF MICHIGAN, ss:

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to claim of appeal of the Realty Holding Company, in the above entitled cause; that the foregoing is a true and correct copy of all the records and proceedings together with the exhibits designated by respective parties to be included in my return to said claim of appeal, as the same appear on file and of record in my office; that I have compared the same with the originals, and that the within is a true and correct transcript therefrom and of the whole thereof as designated by the respective parties.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Detroit, in said District, this fifteenth day of March, in the year of our Lord, one thousand nine hundred and twenty four, and of the Independence of the United States of America, the one hundred and forty eighth.

Elmer W. Voorheis, Clerk United States District Court, Eastern District of Michigan. (Seal of the U. S. District Court, Eastern District of Mich.)

Endorsed on cover: File No. 30,239. E. Michigan D. C. U. S. Term No. 929. Realty Holding Company, appellant, vs. Lavina B. Donaldson. Filed April 2, 1924. File No. 30,239.

In the

Supreme Court of the United States

October Term, 1925.

No. [redacted]348

REALTY HOLDING COMPANY, a Delaware Corporation,
Plaintiff and Appellant,

v.

LAVINA B. DONALDSON,
Defendant and Appellee.

BRIEF FOR PLAINTIFF AND APPELLANT, ON MOTION TO DISMISS OR AFFIRM

JOHN E. BOOD,
Attorney for Plaintiff and Appellant.

[redacted]

[redacted]

In The

Supreme Court of the United States

October Term, 1923.

No. 929.

REALTY HOLDING COMPANY, a Delaware Corporation,
Plaintiff and Appellant,

v.

LAVINA B. DONALDSON,
Defendant and Appellee.

BRIEF FOR PLAINTIFF AND APPELLANT ON MOTION TO DISMISS OR AFFIRM.

STATEMENT OF FACTS.

This is a bill in chancery filed by the plaintiff in the District Court of the United States for the Eastern District of Michigan, Southern Division, alleging among other things:

That the plaintiff conveyed to the defendant several tracts of land in the city of Detroit and elsewhere, as security for the performance by the Clifford Land Company of its covenant with the defendant in a certain long term

lease on property in Detroit, to erect upon the said last named premises a building and pay for the labor and material, and that pursuant thereto the Clifford Land Company had erected said building of approximate value of one million two hundred fifty thousand ($1,250,000.00) dollars, and that the same is now ready for occupancy. (Bill of complaint, paragraphs 6 and 7; Record, pages 2 and 3.)

That in violation of the terms of defendant's lease with said Clifford Land Company, and with intent to cheat and defraud the Clifford Land Company and this plaintiff of all rights in the premises, the defendant had refused to perform her covenants in the said lease, thereby disabeling the Clifford Land Company to perform its part in the premises, and that the said defendant was seeking thereby to defraud and deprive the Clifford Land Company and this plaintiff of all rights in the premises, and that in order to protect its said property and interests, the plaintiff had been compelled to and had purchased and taken an assignment of the said lease from the said Clifford Land Company, thereby acquiring all its rights and interest thereunder. (Bill of complaint, Par. 13, R., 5.)

The grounds upon which the jurisdiction of the court were alleged, were the facts that the plaintiff is a corporation organized and existing under the laws of the state of Delaware, and the defendant was a resident and citizen of Detroit, Michigan, and that the property, which is the subject-matter of suit, is located in the territorial jurisdiction of the court. (Bill of complaint, Par. 14, R., 5.)

The plaintiff prays among other things that the court ascertain its rights in the premises, enjoin the defendant from interfering with the execution and completion by the plaintiff of the contract as set forth in the lease, and from taking any advantage by reason of her failure and refusal to perform the covenants therein contained to be performed by her, and that the plaintiff have such further and other relief in the premises as shall be agreeable to equity and good conscience (R., 6).

A copy of the lease is attached to the bill of complaint as Exhibit A (R., 6-23).

The defendant answered and filed a cross-bill, admitting among other things that she had dealt with the plaintiff as a Delaware corporation by receiving conveyance from it of the several properties as alleged in the bill of complaint. (Defendant's answer, Par. 6, R., 26.)

Later the defendant filed a motion to dismiss the bill of complaint on eight several grounds (R., 38-41), to which plaintiff responded by motion to strike the defendant's motion from the files (R., 46-47).

Both motions were heard together and thereupon the court filed an opinion dismissing the bill of complaint on the sole ground that the court had no jurisdiction in the premises, holding that the action was brought by the plaintiff as an assignee of a chose in action from the Clifford Land Company, and as such assignee had no greater rights than its assignor, a corporation and resident in the same state with the defendant (R., 47-49), and immediately entered decree December 12th, 1923, dismissing plaintiff's bill (R., 49).

Thereupon the plaintiff immediately sought an appeal to the United States Circuit Court of Appeals for the 6th Circuit, and was advised by the judges of the Circuit Court of Appeals, that inasmuch as the only question involved was the jurisdiction of the court, the Circuit Court of Appeals was without jurisdiction, and appeal should be taken directly to the Supreme Court of the United States. Thereupon, Hon. Arthur C. Denison, as judge of the Circuit Court of the United States for the 6th Circuit, on December 14th, 1923, entered an order allowing appeal to the Supreme Court of the United States (R., 51), and fixed a day for hearing of the question as to whether the injunction originally granted by the District Court should be continued pending appeal.

By agreement counsel for plaintiff and defendant appeared before Judge Dennison, at Grand Rapids, December 27th, 1923, at which time the defendant insisted that the appeal was frivolous and not prosecuted in good faith, whereupon Judge Denison found that the claim of appeal was not frivolous and ordered bond of ten thousand ($10,000.00) dollars, to protect the defendant pending appeal and continued the injunction.

The judge's opinion and the order entered thereon omitting the titles, are as follows:

OPINION.

(DENISON, CIRCUIT JUDGE.) Upon the application for a continuance of the preliminary injunction pending the appeal to the Supreme Court, my conclusions are as follows:

1. The continuance of such injunction is essential to prevent the destruction of such rights as plaintiff may have.

2. The appeal to the Supreme Court is not frivolous; and plaintiff has a fair right to be heard upon the question presented. If there is error in this conclusion, a motion to dismiss or affirm will prevent any very long delay.

3. Section 18 of the Clayton Act seems to be imperative in requiring plaintiff to give an injunction bond; and this condition, to meet the letter of the statute, must how be insisted upon. However, the amount and condition of the bond are discretionary and the circumstances do not justify a large bond with a condition or absolute guaranty against any possible loss.

4. The only thing the defendant could do with the property would be to rent it to the best possible advantage. So long as plaintiff does this and applies the net proceeds to defendant's benefit, the defendant is not harmed by plaintiff's possession.

5. The theoretically perfect remedy, in order to protect all respective interests, including defendant's, would be a receivership. This might have been ordered

in connection with the injunction. This power is not lost by reaching the conclusion that the court has no jurisdiction; because it has jurisdiction to decide that question and to protect the subject-matter pending its conclusion. Such collateral proceedings as injunction or receivership or accounting, etc., may well remain in the court below even after an appeal from a decree dismissing the bill. It would have been within the power of the District Court if it had allowed this appeal in a court order, to have provided in this same order that there should be a receivership pending the appeal by way of providing the security, which is to be taken in such cases. I think that power still continues—at least providing its continuance is made a condition of the stay on appeal, and plaintiff (the party in possession) accepts that condition.

6. Hence a circuit judge in taking security for a stay upon an appeal which he allows, may provide, if necessary for the protection of the parties, that the District Court may appoint a receiver whenever the security would be otherwise impaired—in a case where a receivership is the obvious and safe method of getting security but is not advisable at the time the stay is granted.

7. The parties seem to agree that a receivership is not advisable on account of the expense and complications involved, if it can be avoided; and that if plaintiff continues the management of the property and can give to defendant the same security she would have by a receivership, it is the more advisable course.

8. The first and second mortgage interests are much greater in amount than defendant's interest. The accruing of liens, taxes and interest vitally affected these mortgages before they reached defendant, and it is unlikely that the representative of the mortgages would sanction any dealing with these matters which would be practically injurious to defendant's interest.

9. Mr. Bushman seems to represent in a practical

way, the mortgage interests and to be a man of responsibility and good standing. It is a reasonable *prima facie* inference that the handling of these matters satisfactorily to him ought to be satisfactory to the defendant.

10. The current situation will therefore be properly met by providing that the plaintiff shall file in this court, within the first ten days of each calendar month, a statement of all receipts and disbursements pertaining to the building during the previous month, together with written memorandum showing approval by Mr. Bushman; and if, at any time defendant, thinks her interests in the property are being materially injured, the District Court may, on her application and as an ancillary proceeding in this cause, appoint a receiver.

11. Under all the circumstances, it is fair to require plaintiff, if it gets its stay, to give an unconditional guaranty for the payment of such ground rent as accrues to defendant during the delay caused by the appeal.

12. I have signed, and file herewith, an order with these provisions.

Dated January 2nd, 1924.

A. C. Denison,
Circuit Judge.

ORDER.

The undersigned, having heretofore allowed an appeal in the Supreme Court in the above entitled cause, and having continued until this time the matter of the stay asked for in connection with the appeal, and having heard the parties thereon, it is now ordered as follows:

1. That the preliminary injunction heretofore allowed herein by the District Court, be continued in force pending and notwithstanding the appeal, until such appeal is disposed of by the Supreme Court or until that court makes some further order in the premises.

2. That such continuance of injunction be upon the condition that within ten days from this date, the plaintiff file with the clerk of the District Court, with surety and in form to be approved by that clerk, a bond in the penal sum of ten thousand dollars ($10,000), running to the defendant and conditioned that the plaintiff will pay to the defendant such ground rent as may accrue to defendant during the time while such injunction continues in force by the effect of this order—such payment to be subject only to such offsets or equitable conditions as may be imposed by the District Court in this cause in proceedings to be taken therein, after the appeal is disposed of and the case remanded.

3. Such continuance is upon the further condition, accepted and agreed to by plaintiff, that it will within the first ten days of each calendar month, file with the clerk of the District Court, a full statement of all receipts and disbursements on account of the building involved in this suit, and accompanied by a written memorandum signed by F. E. Bushman, showing his approval of the matters shown by such account.

4. Such continuance is upon the further condition, accepted and agreed to by the plaintiff, that the District Court may, at any time upon the application of the defendant and upon what seems to the District Court sufficient cause, appoint a receiver for such property for the purpose of insuring the proper protection of all interests pending the appeal.

Dated January 2, 1924.

A. C. Denison,
Circuit Judge.

The bond was immediately furnished as directed, and accounting has since been made faithfully by the plaintiff to date according to the court's order.

In settling the record for appeal, a controversy arose as to including in the record the affidavits of the defendant

attached to their motion to dismiss without giving the plaintiff an opportunity to meet the allegations therein contained, the plaintiff contending that the affidavits were immaterial as they merely raised questions of fact concerning which no proofs had been or could be taken and were not necessary to determine the question of jurisdiction, but finally appellant consented to include them in the record and they are accordingly printed. This statement is made to account for the delay in perfecting the record from January 18th to March 18th.

LAW BRIEF.

Point 1.

This motion is not properly noticed for hearing, the notice of same being served upon this plaintiff and appellant May 19th, 1924, and the hearing noticed for June 2nd, whereas Rule 6 of this court requires the moving party to give the opposite party at least three weeks' notice in such cases.

Point 2.

Answering the first ground in the motion to dismiss that the appeal is frivolous, without merit, and taken for the purpose of delay only, the plaintiff says that when the District Court held the plaintiff's only interest was as assignee of a chose in action, he forgot that the bill is based on the claim admitted by the defendant that several tracts of land in Detroit owned by the plaintiff in fee were conveyed to the defendant merely as security for performance of the Clifford Land Company's covenant to build.

As to the leasehold, the plaintiff is in actual possession and operation of the premises under a present legal estate for years; and as tenant of the ground and owner of the

building erected by the lessee filed this bill is to protect it's estate from threatened invasion and defeat by the fraudulent conduct of the defendant, which is an entirely different matter from suing for judgment on an assigned chose in action. It is in principle squarely within the decisions of this court and the several courts of appeal, maintaining the right of the holder of an estate in land to sue in the United States Court to protect that estate, though his grantor could not have sued there.

Chief Justice Marshall said:

> "It has not been alleged, and certainly cannot be alleged, that a citizen of one state, having title to lands in another is disabled from suing for those lands in the courts of the United States by the fact that he derives his title from a citizen of the state in which the lands lie. Consequently the single inquiry must be whether the conveyance from McArthur to McDonald was real or fictitious. * * * The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different states. * * * A suspicion may exist that it was for McArthur. The court cannot act upon this suspicion."

McDonald v. Smalley, 1 Peters, 620, 623-624.

In one case suit was brought by a lessee against the Mayor of New York on a lease made by a citizen and resident of New York; and it was contended that the lease was made for the sole purpose of giving jurisdiction to the Federal Court where the lessor could not sue; but the court held that, it appearing that there was a genuine lease, it gave the lessee an estate in the land enabling him to sue in the United States Court, and that the motive for giving the lease was immaterial.

Van Dolsen v. Mayor of New York, 17 Federal, 817, citing and following *McDonald v. Smalley* above.

One of the best discussions of the law and reviews of the authorities on this question that we have found is

Brown v. Fletcher, 235 U. S., 589;

in which it was held that the assignee of the *cestui que trust* having the requisite adverse citizenship could sue in the Federal Court although his assignor could not, the statute as to assignment of choses in action being inapplicable. In delivering the opinion of the court Mr. Justice LaMar said:

> "The restriction on jurisdiction is limited to cases where A is indebted to B on an express or implied promise to pay, B assigns this debt or claim to C, and C as assignee of such debt sues A thereon, or to foreclose the security. Or where A has contracted with B, and B assigns the contract to C who sues to enforce his rights, by bill for specific performance or, by an action for damages for breach of contract. *Shoecraft v. Bloxham, 124 U. S., 730, 735.* * * *
>
> "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action; for he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age, fifty-five."

In *Crown Orchard Company v. Dennis, 229 Federal, 652; 144 C. C. A., 62,* in the Circuit Court of Appeals, Fourth Circuit, the standing timber on certain tracts was sold and the purchaser assigned his rights to the plaintiff who sued to restrain a subsequent grantee from cutting timber on the land and to establish the rights under the first conveyance. It was objected that inasmuch as both parties to the original conveyance were residents of South Carolina the assignee could not sue in the United States Court. The Court of Appeals sustained the jurisdiction relying upon *Ambler, Eppinger, 137 U. S., 480; 11 S. Ct., 173,* and *Brown v. Fletcher* above, and reviewing cases at length.

Point 3.

Defendant's objection, Point 2, that the return is not made within the time prescribed by rule. It is said in defendant's brief, page 9:

> "Plaintiff did not file copies of the record with the clerk of the District Court of the United States of the Eastern District of Michigan, Southern Division, until March 15, 1924, and the return did not reach the clerk of the Supreme Court until March 17, 1924, as the filing of same will verify."

The printed record, page 54, shows that the time for filing the record was extended to March 18th, 1924. The record was filed with the clerk of the District Court March 15th, 1924, and was received by the clerk of this court March 17th, who declined to docket it because the attorney for the plaintiff is not admitted to practice in this court, informing him that appearance must be entered by a member of the bar of this court, and requesting remittance of the balance of the estimated costs. Accordingly plaintiff caused appearance to be entered by Hon. Alfred Lucking, as attorney, until the case could be reached for argument, and remitted the balance of the estimated costs, upon receipt of which, as appears by the printed record, page 55, the clerk of this court docketed the case, April 2nd, 1924.

This court has held that a motion to dismiss for delay in docketing, comes too late if made after the case has been docketed.

Bingham v. Morris, 7 Cranch, 99.

And that ruling has been followed by the various Circuit Courts of Appeal in interpreting the rule of the Circuit Courts of Appeal, which is identical in phraseology with the rule of this court.

Freeman v. United States (1915), 227 Fed., 732, in which Judge Rogers of the Circuit Court of Appeals, Second Circuit, reviews the decisions at some length.

Altemberg v. Grant (1897), 83 Fed., 980, 28 C. C. A., 244, by Judges Taft and Lurton.

Chicago Dollar Directory Company v. Chicago Directory Company (1895), 65 Fed., 483, 466; 13 C. C. A., 8.

Gilman v. Fernald (1905), 141 Fed., 940; 72 C. C. A., 666.

Love v. Busch (1906), 142 Fed., 429.

Point 4.

The defendant's objection that the extension of the time should have been made by the Circuit Court and not by the District Court from which the appeal is taken, is, we submit, without foundation.

The appeal was granted and the injunction continued by Judge Denison, as circuit judge, because it did not seem to the district judge trying the case consistent to continue an injunction after he had held that he was without jurisdiction; but it is submitted that is no reason why the District Court should not extend the time for perfecting the appeal.

Point 5.

The objection, appellee's Point 4, that the return was not made within the time allowed by the extension is merely a mistake of the appellee. The time was extended to March 18th instead of to March 16th, as assumed by appellee, and the return was in the office of the clerk of this court on the 17th.

Point 6.

The defendant's objection, Point 5, that the failure to file a record until March 15th, shows the appeal was taken for purpose of delay, is equally without foundation. It appears by the record, page 54, that defendant's praecipe for amended record was not filed within the time required by rule. This neglect on the part of the appellee was passed over by us without notice, but we submit that appellee should not accuse us of a fault of which she is equally guilty. We are not aware of any case in which a decision has been rendered in the District Court, an attempted appeal made to the Circuit Court of Appeals, and an appeal perfected and returned to this court in less time than in the case at bar.

Point 7.

Defendant's objection, Point 6, that this court is without jurisdiction, if not covered by the preceding objections, is so vague we are not able to understand it.

Point 8.

Defendant's objection, Point 7, with its many subdivisions, is, we submit, sufficiently answered by saying:

(a) The plaintiff has never had an opportunity to answer any of the matters stated under this objection, because the court dismissed the case on the defendant's motion without giving plaintiff an opportunity to answer. The matters so alleged were never passed upon by the District Court, it being said by the district judge on the argument, that these matters could be considered only by allowing the plaintiff to answer and taking proof, on which the burden would be on the party alleging it. These mat-

ters have no relation to the point of jurisdiction the only question passed on in court below.

(b) The defendant is estopped to make any such contentions after having dealt with the plaintiff as a Delaware corporation and receiving conveyance of these properties from it as such. A court of equity will not allow a grantee who has obtained and claims title through a deed to deny the existence and competence of the grantor.

Carver v. Astor, 4 Peters, 1;
Midhiff v. Colton, 252 Fed., 420; 164 C. C. A., 344.

See, also:

5 A. L. R., 1580-1585, for collection of authorities.

(c) By the Statutes of Delaware, upon paying the back taxes, the plaintiff was reinstated to all its rights as if no proceedings had ever been taken against it. We quote the Statute below:

> "In all cases in which the charter of any corporation created after the tenth day of March, A. D., 1899, has become inoperative or void by proclamation of the governor or by operation of law for nonpayment of taxes; and such corporation has been reinstated and entitled to all its franchises and privileges, such reinstatement shall validate all contracts, acts, matters and things made, done, and performed within the scope of its charter by such corporation, its officers and agents, during the time when such charter was inoperative or void, with the same force and effect and to all intents and purposes as if said charter had at all times remained in full force and effect; and all real and personal property, rights and credits which were of said corporation at the time its charter became inoperative or void, and which were not disposed of prior to the time of such reinstatement, shall be vested in such corporation, after such reinstatement, as fully and amply as they were held by said

corporation at and before the time its charter became inoperative or void; and said corporation after such reinstatement shall be as exclusively liable for all contracts, acts, matters and things made, done, or performed in its name and on its behalf by its officers and agents prior to such reinstatement, as if its charter had at all times remained in full force and effect."

Rev. Stat. Del., 1915, Ch. 66, Sec. 81.

(d) To refute the statement in appellee's motion that the plaintiff is not duly incorporated and is not authorized to do business in Michigan, we have procured and filed with the clerk of this court, a copy of the authorization issued by the secretary of state of Michigan, duly certified under the seal of the secretary of state.

We respectfully submit that the motion is without merit and should be denied with costs.

JOHN R. ROOD,
Attorney for Plaintiff and Appellant.

In The

Supreme Court of the United States

October Term, 1923.

No. 348

REALTY HOLDING COMPANY, a Delaware Corporation,
Plaintiff and Appellant,

v.

LAVINA B. DONALDSON,
Defendant and Appellee.

BRIEF FOR PLAINTIFF AND APPELLANT AND AFFIDAVIT OPPOSING MOTION OF DEFENDANT AND APPELLEE TO DISSOLVE INJUNCTION OR REQUIRE ADDITIONAL BOND.

JOHN R. ROOD,
Attorney for Plaintiff and Appellant.

Business Address:
Dime Bank Building,
Detroit, Michigan.

Mich. Brief & Record Co., 4439 Field Ave., Detroit, Mich.

In The

Supreme Court of the United States

October Term, 1923.

No. 929.

REALTY HOLDING COMPANY, a Delaware Corporation,

Plaintiff and Appellant,

v.

LAVINA B. DONALDSON,

Defendant and Appellee.

BRIEF FOR PLAINTIFF AND APPELLANT AND AFFIDAVIT OPPOSING MOTION OF DEFENDANT AND APPELLEE TO DISSOLVE INJUNCTION OR REQUIRE ADDITIONAL BOND.

The motion of defendant and appellee to dissolve the temporary injunction in this cause or require plaintiff to give an additional bond should be dismissed with costs to plaintiff for the following reasons which we will discuss in the order assigned:

I.

The issues involved in this motion and the reasons assigned for a larger bond are the same as those urged, discussed and passed upon by the Honorable Arthur J. Tuttle, district judge, on the issuing of the first temporary injunction on the filing of the bill in this case, and again before the Honorable Arthur C. Denison, circuit judge, who allowed this appeal to this court and continued the injunction pending such appeal; and a great many of the alleged statements of fact relied upon by defendant are contained in their motion to dismiss or affirm, lately heard before this court and continued until the final determination of the cause on its merits.

II.

This motion is made to the wrong court. The supreme court has consistently made it a practice to leave such matters in the hands of the trial court which is more conversant with the facts.

III.

The allegations made in the alleged statement of facts and the affidavits in support thereof are grossly misleading and untrue.

STATEMENT OF FACTS.

We give a summary of the facts involved in this case.

The property involved in this suit is a ten-story fireproof, steel and concrete apartment building, in Detroit, Michigan, erected on land, a part of which was owned by defendant subject to a mortgage which at the time of the entering into the lease from defendant to plaintiff's assignor as set forth in this case, amounted to about $28,500.00. This mortgage was due and payable and foreclosure proceedings were about to be commenced and would have been commenced, had it not been for the intervention of Robert M. Drysdale, president of plaintiff's assigner, and his assurance to the mortgagee that the mortgage would be paid. A lease was concluded between the defendant as Lessor and plaintiff's assignor as Lessee, by the terms of which plaintiff's assignor was to erect the building in question, and defendant agreed to join in the execution of two mortgages on the property, one in the amount of five hundred thousand ($500,000.00) dollars, and the other in the amount of two hundred fifty thousand ($250,000.00) dollars, the second mortgage being to the Guaranty Trust Company of Detroit, as trustee under a second mortgage bond issue.

The defendant agreed to execute such renewal mortgages as would permit the lessee to pay off the principal of the loans at $30,000.00 per year, and if any dispute arose as to the proposed new mortgage the lease provided for arbitration proceedings to settle the same. (See pages 21 and 22 of printed record.)

At the time of the securing of the two mortgages in question, money rates were exceedingly high and mortgagors were obliged to pay seven (7) per cent interest. As the building in question neared completion money had become plentiful, interest rates were low and in addition the second mortgage bonds against the building could be heavily

discounted and the time was then opportune for both parties to refinance this building which would enable Lessee to pay up an arrearage of taxes and accrued interest which had accumulated during delay in completion of the building and which would have permitted plaintiff's assignor to meet its obligations without default.

Defendant had been in harmony with this plan and urging plaintiff's assignor to secure such a loan up and until such a loan had actually been secured, at which time she then deliberately refused to execute any renewal mortgages, and it became apparent that she and her agents were deliberately trying to cheat and defraud plaintiff's assignor out of its interest in this property.

Defendant contended in this regard that the lease did not obligate her to sign new mortgages until the expiration of the old. At this time the first mortgage of five hundred thousand ($500,000.00) dollars would be due in about three and one-half years. Plaintiff contended that it was not obliged to wait until the last year, month or day of the expiration of such a big mortgage in order to renew the same, but claimed that if it produced a mortgage which actually would decrease the incumbrances against the property and be more advantageous to both Lessor and Lessee as to rates of interest and as to payment of principal maturity that the defendant, according to the terms of her lease, was bound to accept the same and join the plaintiff in the execution of such mortgage. A fulfilment of the lease in this regard by the Lessor would have enabled the Lessee to pay off all obligations against the building, and if there should be any shortage in meeting such obligations its interest in the building would then have been sufficient to enable it to borrow such funds as may have been needed.

In this regard a saving of seventy-five hundred ($7500.00) dollars a year in interest, and seventy-five hundred ($7500.00) dollars a year in principal maturities would have been saved by Lessee and it still would have been within the terms of its lease, and in addition thereto a sum amounting

to substantially $125,000.00 could then have been saved which would have paid for the new loan and all indebtedness against the building, and would have safeguarded the interests of both the Lessor and Lessee and made the property very valuable.

On defendant's breach of her leasehold agreement in this regard it became perfectly apparent that she and her agents were determined to cheat and defraud the Lessee out of all its interest in the property, and it developed that such action would be in line and in accordance with the reputation of the defendant and her agents in questionable real estate transactions in and around Detroit.

The matter of a preliminary injunction came on to be heard before the Hon. Arthur J. Tuttle, District Judge, at which time substantially all of the matters as now alleged by defendant in her motion were taken up, discussed and heard and the District Judge then granted a temporary injunction and again before the Hon. Arthur C. Denison, Circuit Judge, who allowed this appeal, substantially the same matters were again taken up and rehashed and the Circuit Judge then continued this injunction pending appeal. (See opinion and order on pages 4-7 in brief of plaintiff on motion of defendant to dismiss or affirm.)

Both the Hon. Arthur J. Tuttle, District Judge and Hon. Arthur C. Denison, Circuit Judge, were perfectly confident that there would be no diversion of funds from the receipts of operations of this building, and that all receipts would be applied against the obligation of the building and left the way open at any time for the appointment of receiver, if occasion arose.

The order of Hon. Arthur C. Denison has been strictly complied with and a statement of receipts and disbursements filed in the district court in this cause each month, and all receipts from the building have been used to defray the obligations of the operation thereof and the obligations of the mortgages.

Unfortunately, however, this building was opened a few months before a black smallpox epidemic was visited upon Detroit and advertised from coast to coast and at a time also when an acute depression in business developed and which practically emptied a great many hotels and apartments in Detroit, and from which conditions they are just now recovering. In spite of this, however, the plaintiff has operated this building so that the obligations of the building have not materially increased.

Defendant, on July 11, 1924, filed in the district court an application for the appointment of a receiver and twice noticed the same for hearing, but in each instance abandoned its motion and did not proceed with the same for reasons unknown to the plaintiff, and substantially the same allegations were made in such petition for receiver as is now made before this court.

Defendant was repeatedly warned by the lessee at the time of Lessor's refusal to co-operate in the refinancing of the building that if the bonds on the building became scattered in the hands of various holders that the interest of both Lessee and Lessor would be seriously jeopardized and it might then become impossible to secure a new mortgage, but in spite of these warnings defendant persisted in her attempt, evilly and fraudulently to squeeze out the interests of lessee in this property.

Receipts from the building have not been sufficient to satisfy both mortgages and have been largely applied on first mortgage, leaving second mortgage interest accruing.

On December 6th, 1924, the Guaranty Trust Company of Detroit, trustee, under the second mortgage bond issue and under the terms of the second mortgage deed of trust, executed by defendant and plaintiff's assignor, made demand upon plaintiff for the possession of this property, which demand was complied with in accordance with the terms of said deed of trust, and the said Guaranty Trust Company of Detroit, is now in possession of said property under its deed of trust and collecting the rentals thereof.

ARGUMENT.

One.

The matters now urged before the court on this motion are substantially the same as urged before the District Judge on granting the first temporary injunction, and again before the Hon. Arthur C. Denison, Circuit Judge, on the granting of the injunction pending appeal. Both of these judges were fully advised in the premises, heard the affidavits on both sides, and both without hesitation granted the injunctions. (See opinion and order of Hon. Arthur C. Denison, pages 4-7 of brief for plaintiff on motion of defendant to dismiss or affirm.)

If defendant was dissatisfied with these decisions she had the right to appeal to the Circuit Court of Appeals under Section 129 of the Judicial Code, being 36 Statutes at Large, 1134. By failure to appeal from the order of Hon. Arthur C. Denison, she has lost her right to complain of matters appertaining to this injunction. We do not claim that she has lost her rights to have the merits of this appeal determined but as to matters appertaining to the injunction she has had her day in court.

Chaplin v. Yellow Lumber Company, 143 Fed. Rep., 201, on page 205.

Two

Rule 74 of Equity Rules promulgated by this court leaves in the District Court the right to grant, refuse or modify injunctions pending appeals.

This court, in the case of *Hovey v. McDonald, 109 U. S., 150,* held that this rule established the procedure for the District Courts to carry into effect their inherent right to regulate these matters pending appeal.

On appeals to the Supreme Court from the orders of District Courts on injunction matters appertaining to the enforcement of State Laws which proceedings come under Section 266 of the Judicial Code, 36 Statutes at Large, 1162, and appeals therefrom to this court under Section 266 of the Judicial Code, this court has held in

Cumberland Tel. Company v. Pub. Serv. Comm., 260 U. S., 212,

that while the granting of such an injunction pending appeal is within the power of this court that applications therefore will generally be referred to the court who heard the case on its merits, and that without abdicating its power to grant an application to preserve the *status quo* and the continuance of an injunction and conceiving that exceptional cases may arise, the Supreme Court is generally inclined to refer such applications to the judges who have heard the whole matter. (See, also, *Zoline on Fed. Appellate, Jurisdiction and Procedure, on page 176.)* This was a case of appeal from an order allowing an injunction and not an appeal from the merits of the case.

It seems then that upon an appeal from a final order or decree, such as the case at bar, the District Judge who heard the case on its merits has the exclusive right to make all necessary orders appertaining to injunctions under Equity Rule 74 promulgated by this court and the agrieved party has the right of appeal therefrom to the Circuit

Court of Appeals, and that where appeals are allowed on interlocutory orders direct to the Supreme Court, that in such cases the Supreme Court, without abdicating its power to hear the same has adopted the rule of leaving all such matters to the judges who have heard the whole matter.

Three.

Refutation of defendant's alleged statement of facts.

The allegations in the alleged "Statement of Facts" and the affidavits supporting the same in defendant's motion, are largely untrue, and substantially the same allegations have been made before the District Judge and the Circuit Judge who allowed this appeal. Answering the same in their order, plaintiff says:

The defendant attempts to insinuate that Robert M. Drysdale, president of plaintiff's company, dealt unfairly with the defendant, an elderly lady. As a matter of fact the defendant and her nephew, Donaldson Craig, who largely transacts her business and whose affidavit accompanies that of Lavina B. Donaldson, defendant, have a well known reputation in Detroit, as being real estate "Sharpers" and for fostering litigation.

The Realty Holding Company was organized in 1920 by some bankers, real estate men of Detroit, and Robert M. Drysdale, not for $1,000,000 as stated in the alleged statement of facts, but for $50,000.00 authorized preferred stock and 5,000 shares of common stock and real estate holdings of the approximate value of $25,000.00 was turned into this company. The statement on page 5, second paragraph of defendant's printed motion that "This corporation never had functioned nor did it transact any business whatsoever until the transaction so-called in question took place," is absolutely false and untrue, and the affidavit of Lavina B. Donaldson, defendant, on page 17 of this printed motion, paragraph 2, that she

has read "statement of facts" made by counsel in support of the motion; "that the facts therein stated are true of her own knowledge," is likewise a false affidavit. Defendant in her sworn answer and cross-bill, paragraph 6, on page 26 of the printed record, there admits receiving from this plaintiff deeds to the properties transferred by the plaintiff to the defendant as security for the erection of the building in question, the value of which properties as alleged in plaintiff's bill of complaint, paragraph 6, on pages 2 and 3 of the printed record is set at $25,000.00, which conclusively proves that plaintiff had functioned and was not inoperative.

Shortly before summary proceedings in Michigan Courts were commenced by defendant, the plaintiff corporation took by assignment from the Clifford Land Company all of the interest of Clifford Land Company in the building in question in this suit so as to enable the plaintiff to more fully protect its property which it had turned over to this defendant as security for the completion of said building.

Every time this matter has been before any court or judge, the defendant has placed great stress upon the point that the charter of plaintiff's corporation had been suffered to lapse in Delaware by reason of nonpayment of taxes in Delaware and that the charter was not reinstated until July 18th, 1923, one day after commencement of this suit, although the proceedings, affidavits and all matters to accomplish such reinstatement had been filed previous to that time. The Statutes of Delaware clearly cover this point and clearly specify that all rights and property held by the corporation at the time its charter may have become inoperative or void and which were not disposed of prior to the time of reinstatement, shall be vested in such corporation after such reinstatement as fully and amply as if the charter had never become inoperative. (See page 14, printed brief of plaintiff on motion to dismiss or affirm.)

It is admitted that the Clifford Land Company, the assignor of plaintiff, has no property, it having assigned all of its property to the plaintiff. The Realty Holding Com-

pany, the plaintiff and Robert M. Drysdale are not irresponsible and uncollectible as alleged by the defendant, but on the contrary are responsible and collectible. The Realty Holding Company has a substantial sum of money invested in this enterprise although it was clearly contemplated at the inception of this transaction that plaintiff's assignor should put nothing into the enterprise and that defendant should put only her equity in a part of the land on which the building is located and which at that time was about to be foreclosed upon. (See exhibit attached to defendant's answer and cross-bill, page 32 printed record) and since the commencement of this suit alone, the plaintiff has put into this enterprise substantially $25,000.00 in cash which is shown by the auditor's report of receipts and disbursements in connection with this building and which copies from time to time have been furnished this defendant.

The statements that Mr. Drysdale has openly and repeatedly made threats to harass and embarrass this defendant is wholly false and without any foundation whatsoever. Plaintiff admits that its president, Mr. Drysdale did caution defendant, however, that if she persisted in violating her written contract to assist in refinancing this building, that in the end it might result in a loss of the building to both parties, and the said Drysdale did claim that if defendant broke her contract that the plaintiff would expect full damages in a proper action to collect the same.

Rentals and income from this building have not been used to suit the caprices of Robert M. Drysdale or any other person, but every dollar thereof has been used to defray the expense of the operation of the building and to pay legitimate claims against the same, and a complete audit thereof by certified public accountants agreeable to the bankers controlling the two mortgages have been filed each month in the District Court, and no other receipts from said building have been received except as shown in said report.

Defendant knows that there is not $94,644.00 unpaid on interest of the first mortgage of $500,000.00 as alleged on page 10 of its printed motion. There is less than $36,000.00 of interest due on said mortgage.

All defendant invested in this enterprise was her equity of redemption under a mortgage on a portion of the land on which this building is located which she owned at the time of making the lease in question.

There is no question but that foreclosure proceedings on behalf of the mortgage interests would jeopardize not only defendant's equity in the property but also that of the plaintiff. It is apparent that the defendant would rather jeopardize her interest in the entire property in an effort to cheat and defraud the planitiff out of its interest so she could get the whole interest, than live up to her written agreement with respect to the property.

Since this action was commenced by the plaintiff, the plaintiff has invested in this project from sources other than the income from the building, approximately $25,000.00, and in addition thereto has procured the building to be completely furnished and equipped without which furniture it could not have been rented at all.

SUMMARY.

Defendant leased to plaintiff's assignor the ground on which the building in question was erected. Plaintiff's assignor was to and did pay off an existing mortgage of about $28,500.00 and paid the defendant about $1500.00 in cash, making a total of $30,000.00 paid defendant out of the mortgage proceeds. Plaintiff's assignor procured the building in question to be financed and constructed and defendant gave plaintiff's assignor the thirty-three-year lease in question and signed both construction mortgages with plaintiff's assignor, and agreed with plaintiff's assignor to sign such renewal mortgage as would permit the plaintiff's assignor to pay off the mortgage incumbrance at the rate of $30,000.00 per year.

It is perfectly apparent that defendant procured plaintiff's assignor to finance and construct this building and complete it to the point of occupation, and then deliberately violated her written agreement to execute renewal mortgages in an apparent effort to defraud the plaintiff's assignor out of all its interest in the property, and by so doing to take away from the plaintiff the real estate securities which it had deposited with defendant to guarantee completion of the building and payment therefor.

To the query of Hon. Arthur J. Tuttle, District Judge, and Hon. Arthur C. Denison, Circuit Judge, when this matter has been before the court for the granting and continuance of the temporary injunction as to the reason why defendant had not better refinance the mortgages and safeguard her property, there has been absolutely no satisfactory answer or reasonable explanation therefor.

The plaintiff in this cause is attempting to prevent a threatened invasion of its estate in this property by the defendant and to prevent the defendant from taking any advantage of her own default in the terms of the lease.

As was pointed out by the Hon. Arthur J. Tuttle, District Judge, and the Hon. Arthur C. Denison, Circuit Judge, all that either party could do would be to operate the building and apply the proceeds on the mortgage indebtedness. This is what plaintiff has done and in addition thereto invested substantially $25,000.00 of its own resources in the enterprise since this suit was commenced.

The Guaranty Trust Company of Detroit, trustee under the second mortgage bond issue is now in possession of the building and collecting the rents, so this alone should be a sufficient answer to defendant's motion, as the Trust Company will, of course, be obliged to apply all the receipts from the building against the obligations thereof the same as has heretofore been done by this plaintiff.

The matters in plaintiff's motion are simply a rehash of alleged facts and arrangements heretofore and already presented, and her motion should be dismissed with costs to the plaintiff.

JOHN R. ROOD,
Attorney for Plaintiff and Appellant.

Business Address:
Dime Bank Building,
Detroit, Michigan.

In The

Supreme Court of the United States

October Term, 1923.

No. 929.

REALTY HOLDING COMPANY, a Delaware Corporation,
Plaintiff and Appellant,

v.

LAVINA B. DONALDSON,
Defendant and Appellee.

State of Michigan,
County of Wayne—ss.

ROBERT M. DRYSDALE, being duly sworn, deposes and says that he is the president and general manager of Realty Holding Company, the plaintiff in the above entitled cause, and makes this affidavit in opposition of motion of defendant to dissolve the injunction in this cause or require plaintiff to give additional bond, and that this deponent has read the brief opposing such motion and the "statement of facts" therein contained and the "Refutation of defendant's alleged statement of facts" contained in said brief, and all allegations in said printed brief, and that this deponent knows the contents thereof, and that the facts therein stated are true of his own knowledge except as to matters therein

stated upon information and belief, and as to such matters he believes it to be true.

Robert M. Drysdale.

Subscribed and sworn to before me this 19th day of December, 1924.

Grace Geary,
Notary Public,
Wayne County, Michigan.

My commission expires February 7, 1927.

In The

Supreme Court of the United States

No. 929

REALTY HOLDING COMPANY, a Delaware Corporation, So-called,

Plaintiff in Error,

vs.

LAVINA B. DONALDSON,

Defendant in Error.

IN ERROR TO THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION ON BEHALF OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM

Now comes Lavina B. Donaldson, defendant in error in the above case, and, by her attorneys, moves the Court to dismiss the writ of error herein or to affirm summarily the decision of the United States District Court for the Eastern District of Michigan, Southern Division, for the following reasons:

(See Statement of Fact, pages 6, 7, 8 and 9.)

1. That the appeal is frivolous, without merit and taken for the purpose of delay.

2. That the return was not made within the time prescribed by rule.

3. That the Order granted by the Hon. Charles C. Simons, District Judge, to extend the time in which to make return was without jurisdiction. That the power to grant an extension in which to make return was with the Circuit Court of the Sixth Circuit, the Court that had allowed the appeal.

4. That the return was not made within the time allowed by the extension.

5. That plaintiff's neglect to file copies of the records to be returned, until March 15, 1924, show that the appeal was taken for the purpose of delay.

6. That the Court is without jurisdiction.

7. Because defendant in her motion to dismiss the Bill of Complaint, set forth several reasons therefor, none of which were denied by plaintiff. The following facts stand uncontradicted upon the record, viz:

(a) That the Realty Holding Company was never legally organized in the State of Delaware.

(b) That the Realty Holding Company ceased to function in the State of Delaware, for the reason that it neglected to pay the tax of $57.29 levied for the "year 1920 due March 15th, 1921," and subsequent taxes due the State of Delaware.

(c) That the proceedings instituted by defendant in this case against the Clifford Land Company, in the courts of Michigan, were ample to grant full, adequate and complete relief to and over all parties and the subject-matter.

(d) That Robert M. Drysdale is the President of the Clifford Land Company and the Realty Holding Company.

(e) That Robert M. Drysdale, as President of the Clifford Land Company, after Miss Donaldson, defendant in this case, had instituted proceedings in the courts of Michigan against the Clifford Land Company to oust it from the property in question, and on July 12, 1923, signed and swore to a petition addressed to the Governor of Delaware setting forth:

"That the charter of the petitioner has become inoperative and void by operation of law for non-payment of taxes due to the state, said taxes due to the state being as follows, to-wit:

Franchise Tax for year 1920, due March 15, 1921	$ 57.29
Penalty	13.75
Franchise Tax for year 1921, due March, 1922..	36.24
Penalty	4.35
Franchise Tax for year 1922, due March 26, 1923	20.00
	$131.63

That the company now desires to secure a reinstatement of its rights and franchises under its charter for the purpose of resuming active business."

(f) That the Realty Holding Company *was not reinstated by the Governor of the State of Delaware until July* 18, 1923; *notwithstanding, Robert M. Drysdale swore to, and filed the Bill of Complaint on July* 17, 1923, setting forth that the Realty Holding Company was a duly organized and legally existing corporation in the State of Delaware, and entitled to transact business in the State of Michigan.

(g) That the Realty Holding Company was never authorized to do business in the State of Michigan.

(h) That when the certified copy of the Articles of Incorporation of the Delaware Corporation were filed with the Secretary of State in Michigan, to-wit, on Oct. 31, 1921, Mr. Drysdale knew the Delaware Corporation was a defunct organization, unauthorized, and legally incapable of functioning, either in the State of Delaware or the State of Michigan. To use his language in his application to reinstate the Delaware corporation: "That the charter of the petitioner has become inoperative and void by operation of law for non-payment of taxes, etc."

(i) That on filing a certified copy of the Articles of Incorporation of said Delaware Corporation, in the office of the Secretary of the State of Michigan, the Secretary of State did not sign the Certificate authorizing the Delaware Corporation to transact business in the State of Michigan.

(j) That after the Governor of the State of Delaware reinstated the corporation in the State of Delaware no certificate of the reinstatement was filed with the Secretary of the State of Michigan, authorizing the defunct organization to do business in the State of Michigan.

(k) That at the time Robert M. Drysdale, President of the Clifford Land Company, assigned the 33-year lease over to the Realty Holding Company, to-wit, in July, 1923, the Realty Holding Company was a defunct organization in the State of Delaware and never was authorized to do business in the State of Michigan.

(l) That Robert M. Drysdale fraudulently assigned the 33-year lease of the Clifford Land Company over to the Realty Holding Company for the express purpose of depriving the courts of the State of Michigan of the jurisdiction over the matters pending in its courts, and for the further express and manifest purpose of conferring jurisdiction over the lease-hold interests in the property held by the Clifford Land Company, to the United States Courts.

(m) That the injunction was obtained by Mr. Drysdale, in the United States Court restraining the Courts of Michigan from proceeding to determine the matters in controversy, through fraud, deception and fraudulent representations.

SIDNEY T. MILLER,
GEORGE L. CANFIELD,
LEWIS H. PADDOCK,
FERRIS D. STONE,
SIDNEY J. MILLER, JR.,
JOHN C. SPAULDING,
GRANT L. COOK,
JOSEPH H. CLARK,
HAROLD H. EMMONS,
W. G. BRYANT,
GEORGE H. KLEIN,
L. B. GARDNER,
FRANK L. DODGE,
Attorneys for Defendant in Error.

John C. Spaulding

In The

Supreme Court of the United States

May Term, 1924

No. 929

REALTY HOLDING COMPANY, a Delaware Corporation, So-called,

Plaintiff in Error,

vs.

LAVINA B. DONALDSON,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

STATEMENT OF FACT

Plaintiff alleges in its Bill of Complaint that it is a Delaware Corporation. That sometime in July it obtained by assignment a 33-year lease of certain valuable property in the city of Detroit, Michigan, which Miss Donaldson, the defendant herein, gave to the Clifford Land Company, a Michigan Corporation.

Miss Donaldson, in the early summer of 1923, instituted certain proceedings in the courts of Michigan to

terminate the lease and to oust the Clifford Land Company from the premises, because of its several defaults.

Robert M. Drysdale is the President of both companies, and practically the owner of all stock in both companies. He claims to have assigned the 33-year lease of the Clifford Land Company to the Realty Holding Company, sometime in July, 1923, and about the time Miss Donaldson instituted her proceedings in the courts of Michigan to oust the Clifford Land Company from her premises. The assignment was entirely without consideration and was made for the fraudulent purpose of instituting this suit in the United States Court and thereby deprive the courts of Michigan of jurisdiction.

The Realty Holding Company was organized in the State of Delaware with a capital stock of $1,000,000 with *but* 10 *shares subscribed, representing* $1,000 *paid in; but in fact, nothing had been paid.* Immediately after its organization it established offices in the city of Detroit, where its President and other officers permanently reside. The Clifford Land Company was organized in Michigan and practically without property. Neither corporation was active, nor had done any business until the transaction in question.

Shortly after Miss Donaldson instituted the proceedings in the Courts of Michigan to oust the Clifford Land Company from the property in question, Mr. Drysdale, as President of the Realty Holding Company, and on July 12, 1923, petitioned the Governor of the State of Delaware to have the Realty Holding Company, which had become "inoperative and void" on account of nonpayment of the tax due to the State of Delaware, to be reinstated, setting forth that the corporation had become "inoperative and void."

The reinstatement of the Delaware Corporation was not made until July 18, 1923; notwithstanding, Mr. Drysdale swore to and filed the Bill of Complaint in this case, on July 17, 1923, the day preceding the reinstatement of the Realty Holding Company, by the Governor of Delaware.

A certified copy of the Articles of Incorporation of the Realty Holding Company was not filed with the Secretary of State for the State of Michigan until Oct. 31, 1921. The Secretary of State for the State of Michigan never authorized the corporation to do business in the State of Michigan. When the certified copy of the Articles of Incorporation of the Realty Holding Company were filed with the Secretary of State for the State of Michigan, the Delaware corporation had become "inoperative and void" because of non-payment of the tax to the State of Delaware. In fact, the corporation had ceased to function about six months prior thereto.

After plaintiff filed this Bill of Complaint, this motion was supported by a certified copy of the petition made by Mr. Drysdale, as president of the Realty Holding Company, to reinstate the Realty Holding Company in the State of Delaware, and certain affidavits in support thereof, *Defendant went to the hearing without answer or affidavit denying the reasons set forth in defendant's motion.*

Judge Arthur J. Tuttle, before whom the motion was heard on Dec. 12, 1923, filed his opinion sustaining defendant's motion to dismiss. Plaintiff made an ex parte application to Hon. Arthur C. Dennison, one of the Circuit Judges of the Sixth Circuit, for an order to permit

an appeal to the Supreme Court of the United States. On Dec. 16, 1923, the appeal was allowed. On Jan. 16, 1924, an ex parte application was made to Hon. Charles C. Simons, one of the judges of the District Court of the United States of the Eastern District of Michigan, Southern Division, for an extension of time in which to make return to this Court. Judge Simons signed an order extending the time from Jan. 16, 1924, to March 16, 1924, in which to make return.

Plaintiff did not file copies of the record with the Clerk of the District Court of the United States of the Eastern District of Michigan, Southern Division, until March 15, 1924, and the return did not reach the Clerk of the Supreme Court until March 17, 1924, as the filing of same will verify.

IS THIS COURT WITHOUT JURISDICTION IN THE PREMISES? IN OTHER WORDS, WAS THE DISTRICT JUDGE RIGHT IN DISMISSING THE BILL OF COMPLAINT FOR WANT OF JURISDICTION?

The best answer we can give to this question is to quote verbatim the very able and lucid opinion of the learned Judge, the Hon. Arthur J. Tuttle, who seemingly passed on the question as one controlled by the most elementary principles.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, IN EQUITY.

REALTY HOLDING COMPANY, a Delaware Corporation,
Plaintiff,
vs.
LAVINA B. DONALDSON,
Defendant.

No. 598.

JOHN R. ROOD, Esq., of Detroit,
Attorney for Plaintiff,

MESSRS. MILLER, CANFIELD, PADDOCK & STONE, of Detroit,
Attorneys for Defendant.

Tuttle, District Judge. This case is before the Court on a motion by defendant to dismiss the bill of complaint for reasons which include asserted absence of jurisdiction in this Court. The only ground of jurisdiction invoked by plaintiff is that based on alleged diversity of citizenship.

The bill avers that plaintiff is a Delaware corporation and that defendant is a resident of Detroit, Michigan, within this district. Plaintiff seeks in its bill to enforce specific performance of a 33-year lease of certain premises located in said city of Detroit, which lease is alleged in the bill to have been granted by defendant to the Clifford Land Company, a Michigan corporation, and to have been thereafter assigned by the lessee named, to the plaintiff. The suit is not claimed by plaintiff to be, and clearly is not, a proceeding in rem, but is a suit to recover rights

and to obtain relief in personam against the defendant. A copy of said lease is attached to the bill and by reference made a part thereof, and various violations of such lease are alleged and complained of as the substantial basis for relief sought. The main object of the suit is the enforcement of the terms and provisions of this lease.

After filing an answer on the merits and a counterclaim (designated therein as a "cross-bill" in apparent disregard of the language of Equity Rule 30), asking that plaintiff be enjoined from interference with the claimed right of defendant to terminate said lease, defendant filed the motion to dismiss already referred to.

Plaintiff has filed a motion to strike from the files the motion to dismiss the bill, urging that defendant is not now in position to object for the first time to the jurisdiction of the Court. This contention is plainly without merit. It is elementary law that the jurisdiction of a federal court over a cause pending therein must affirmatively appear from the pleadings or record in such cause and that the absence of a showing of such jurisdiction not only may be brought to the attention of the court at any stage of the proceedings, but will be noticed, with resultant dismissal of the suit, by the court on its own motion even against the protests of the parties.

Morris vs. Gilmer, 129 U. S. 315.
Thomas vs. Board of Trustees, 195 U. S. 207.
Chicago, Burlington and Quincy Railroad Co. vs. Willard, 220 U. S. 413.
Utah-Nevada Company vs. DeLamar, 133 Fed. 113 (C. C. S. 9).

Indeed, Section 37 of the Judicial Code expressly provides that:

> "If in any suit commenced in a district court * * * it shall appear to the satisfaction of the said district court, at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, * * * the said district court shall proceed no further therein, but shall dismiss the suit."

The first subdivision of Section 24 of the Judicial Code provides, among other things, as follows:

> "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment has been made."

The lease involved herein is such a chose in action.

> *Bradley vs. Hunt*, 8 Wall. 393.
> *Republic Mining Co. vs. Jones*, 37 Fed. 721.
> *Brooks vs. Laurent*, 98 Fed. 65 (C. C. A. 5).

A suit to enforce specific performance of a contract (even if such contract relate to real estate) is a suit to recover upon a chose in action within the meaning of the statute just quoted.

> *Corbin vs. Black Hawk Co.*, 105 U. S. 659.
> *Shoecraft vs. Bloxham*, 124 U. S. 730.

Plant Investment Co. vs. Jacksonville, Tampa and Key West Railway Co., 152 U. S. 71.
State of Maine Lumber Co. vs. Kingfield Co., 218 Fed. 902.

The fact that the main object of the present suit is the specific performance of the lease in question indicates the character of such suit as one to recover upon a chose in action and therefore within the provisions of said statute.

Kolze vs. Hoadley, 200 U. S. 76.

As, therefore, it appears that the assignor of said chose in action and the defendant are citizens of the same state, it is plain that this suit could not have been prosecuted in this court if the assignment mentioned had not been made. It follows that the motion to dismiss the bill must be granted.

It should perhaps be remarked that while the bill does not specifically allege that defendant is a citizen of Michigan, yet no objection on that ground has been raised by defendant and it is apparently undisputed and conceded that the defendant is a citizen of that state, and the matter has been disposed of on such assumption. This assumption, of course, does not prejudice plaintiff, as otherwise its bill should be dismissed for lack of allegation and of any diversity of citizenship between the parties.

Arthur J. Tuttle,
District Judge.

Detroit, Mich.
December 12th, 1923.

Perhaps the following authorities cited by defendant on the hearing of the Motion to dismiss the Bill of Complaint for want of jurisdiction may be of interest to the Court.

It is obvious that the present suit could not have been prosecuted in the Federal Court if the lease had not been assigned by the original lessee, a Michigan corporation, to a citizen of another state. It remains, therefore, only to consider whether this suit is one to recover upon a chose in action. The bill seeks specific performance of a covenant in the lease. The words "chose in action" have several times been construed by the courts to be used in a broad sense, and not to be limited to negotiable instruments and similar obligations.

In *Bushnell vs. Kennedy,* 9 Wall. 387, the claim assigned was a simple contract debt, apparently a mere loan with verbal promise to pay. The court said:

> "That the indebtedness of Bushnell to Mills and Frisby was a chose in action cannot be doubted; for under that comprehensive description are included all debts and all claims for damages for breach of contract, or for torts connected with contract. Nor can it be denied that every suitor who brings an action in a court of the United States must aver in his pleadings a state of facts which, under the national constitution and laws, gives to the court jurisdiction of his suit."

In *Corbin vs. County of Black Hawk,* 105 U. S. 659, the suit was for specific performance of a contract to sell land. The court said:

"There can be no doubt that the original contracts in this case are choses in action, in respect to the rights acquired thereunder by the parties thereby contracting to purchase the lands. It is equally clear that by the instruments executed to the plaintiff by such purchasers, selling and conveying to him their several interests in the several tracts of land, and assigning to him all their rights under said several contracts, he became the assignee of the contracts, as choses in action, in respect to the rights of the assignors thereunder, including their rights of action thereon which are sought to be enforced in this suit. * * * The suit is really one for the specific performance of the contracts, to enforce them, to realize the fruits of the rights secured by them to the purchasers, and to reinstate the plaintiff in the position which he is entitled to occupy under the contracts as assignee thereof, notwithstanding any acts done by the county or its officers in impairment of the rights acquired by the contracts. Such a suit must be regarded as one to recover the contents of the contracts."

In *Shoecraft vs. Bloxham,* 124 U. S. 730, a contract had been made for the conveyance of lands by state trustees to a railroad company. The railroad issued bonds secured by a trust mortgage on the lands, and the trustee sued to compel the conveyance of the lands to the railroad to perfect his security.

The conveyance to the company of the lands held by the trustees pursuant to the contract between those parties is essential to the value of the security offered

for the bonds executed to the Security Construction and Trust Company, and to enable the complainant to discharge the trust accepted by him. But the contract being between citizens of the State of Florida, a suit upon it could not be maintained by the railroad company in the Circuit Court of the United States, and therefore could not be maintained by its assignee, the complainant.

This conveyance of all right, title and interest in and to the lands granted, or agreed to be granted, by the contract of sale, carried with it to the complainant an interest in the contract so far as such lands were concerned, that is, the right to perfect the title to the lands by enforcement of the contract. It was in legal effect the assignment of the contract itself. If he cannot enforce that contract and thus secure the title to the company, the deed of trust, so far as the lands covered by the contract are concerned, is worthless as a security. If he has no interest in the contract he has no standing in court to ask its enforcement, and if he is to be regarded as an assignee of the contract under the deed of trust he is disabled from maintaining the suit in the Circuit Court by Section 629 of the Revised Statutes.

A bill of lading was held to be a chose in action within the meaning of this section and a suit brought by a foreign assignee of a domestic assignor was dismissed in *State Bank vs. C. and N. W. Ry. Co.*, 281 Fed. 345.

A suit by an assignee for specific performance of a contract for sale of land was dismissed, one of the assignors being a citizen of the same state as defendant, in *State of Maine Lumber Co. vs. Kingfield Co.*, 218 Fed. 902.

The cases above cited hold that the words "chose in action" include any action on contract, and specifically include a suit in equity for specific performance of a contract to convey real estate. It necessarily follows that they include a suit for specific performance of the covenants of a lease, and that the plaintiff in this suit has no right to bring such a suit in this court as assignee of a Michigan Corporation.

Plaintiff's argument in the lower court, which we presume will be substantially repeated here, attempted to distinguish the cases cited above and to present the case at bar as being governed by another line of decisions, of which *Brown vs. Fletcher,* 235 U. S. 589, and *Guffey vs. Smith,* 237 U. S. 101, are examples. These decisions hold that suits to protect property rights, as distinguished from suits on choses in action, may be brought in the Federal court by assignees regardless of the citizenship of the assignors.

It seems to us that plaintiff's counsel has misapprehended the distinction. In some of the cases cited by him the action was brought to recover possession of, or establish title to, the property assigned. In the others the action was to protect a vested estate from a threatened wrong arising outside the instrument by which the estate was created. In none was there an action sounding in contract to enforce purely contractual rights existing between the defendant and the plaintiff's assignor at the time of the assignment.

In the present case the plaintiff is threatened with no wrong or injury except the alleged breach of an executory covenant contained in the lease. Unless the

defendant is guilty of a breach of her executory agreement, plaintiff's leasehold interest, under the undisputed facts, has been forfeited by its own breach of the lease. The suit is for specific performance of the executory covenant, which it is claimed defendant has broken. If plaintiff is entitled to specific performance of this covenant, it is entitled to a decree, provided this Court has jurisdiction to entertain the case. If it is not entitled to specific performance of the covenant, it is entitled to no relief from this or any other court.

The true rule is stated in *Guffey vs. Smith,* 237 U. S. 101, as follows:

> "Rightly understood, this is not a suit for specific performance. Its purpose is not to enforce an executory contract to give a lease, or even *to enforce an executory promise in a lease already given,* but to protect a present vested leasehold amounting to a freehold interest, from continuing an irreparable injury calculated to accomplish its practical destruction. The complaint is *not that performance of some promised act is being withheld or refused,* but that complainants' vested freehold right is being wrongfully violated and impaired in a way which calls for preventive relief."

Under this rule the present case being one "to enforce an executory promise in a lease already given" comes exactly within the definition there given of causes of action, which cannot be assigned so as to confer jurisdiction on the Federal Court.

A different question might arise if the defendant had consented to the assignment and recognized the plaintiff as her tenant; but such is not the case here. In fact the bill of complaint shows on its face (Par. 13) that the plaintiff procured the assignment for the purpose of bringing this suit, and not because it desired to become the actual lessee of the property.

It may be claimed that the plaintiff is entitled to maintain this suit to protect its interest in the property conveyed by it as security (Bill of Complaint, par. 6), but the bill shows that this conveyance was made as security only for the completion of the building according to plans and specifications. The bill further alleges (Par. 7) that the building is completed and ready for occupancy. It is not claimed that defendant's alleged breach of covenant prevented its completion. If the building, so completed, complies with the plans and specifications plaintiff is entitled to a reconveyance of its own property whether the lease of defendant's building remains in force or is forfeited for the defaults of plaintiff's assignor, and its rights in that property cannot be affected in any way by the outcome of this suit.

All of which we most respectfully submit.

SIDNEY T. MILLER,
GEORGE L. CANFIELD,
LEWIS H. PADDOCK,
FERRIS D. STONE,
SIDNEY J. MILLER, JR.,
JOHN C. SPAULDING,
GRANT L. COOK,
JOSEPH H. CLARK,
HAROLD H. EMMONS,
W. G. BRYANT,
GEORGE H. KLEIN,
L. B. GARDNER,
FRANK L. DODGE,

John C. Spaulding

Attorneys for Defendant in Error.

In The

SUPREME COURT OF THE UNITED STATES

No. 929

REALTY HOLDING COMPANY, A Delaware Corporation, So-called,

Plaintiff in Error

vs.

LAVINA B. DONALDSON,

Defendant in Error.

IN ERROR TO THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

Motion on Behalf of Defendant in Error to Dissolve the Injunction or Require Plaintiff to Give Bond to Cover Defaults of $200,000 and Upwards.

Now comes Lavina B. Donaldson, defendant in error in the above case, and, by her attorneys, moves the Court to dissolve the Injunction issued in the above cause or require the defendant to file a bond in the penal sum of $200,000 or such other amount as the Court may deem adequate to cover the several defaults of defendant under

the lease from Miss Donaldson which now amounts to over $200,000 and otherwise to protect the interests of the defendant, until the hearing on the merits takes place or in default of filing bond that the Injunction be dissolved and the case be dismissed. This motion is based on the records and files in this case and the affidavits hereto attached.

Sidney T. Miller,
George L. Canfield,
Lewis H. Paddock,
Ferris D. Stone,
Sidney T. Miller, Jr.,
John C. Spaulding,
Grant L. Cook,
Joseph H. Clark,
Harold H. Emmons,
W. G. Bryant,
George H. Klein,
L. B. Gardner,
F. L. Dodge,

Attorneys for Defendant in Error.

In The
SUPREME COURT OF THE UNITED STATES
No. 929

REALTY HOLDING COMPANY, A Delaware Corporation, So-called,
Plaintiff in Error,
vs.
LAVINA B. DONALDSON,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Brief in Support of Motion to Dismiss or Affirm.

STATEMENT OF FACT

March 31, 1922, defendant, an unmarried woman 65 years of age and upwards, in poor health, hard of hearing, much of the time confined in private hospitals under the care of a doctor, was the owner of a parcel of land situate in the city of Detroit, State of Michigan, reasonably and fairly worth $150,000. That while so seized, she gave a 33-year lease to the Clifford Land Company, a Michigan corporation, organized March 4, 1922, of which Robert M. Drysdale was and now is the President and who then and now is practically the owner of the entire stock with no assets.

The lease provides that the Defendant in Error was to borrow $750,000; to secure, she was to give two mortgages of $500,000 and $250,000 respectively, on the property.

Twenty-five thousand dollars of this loan was to be used by Defendant in Error to purchase a small piece of land contiguous to her property, on which was to be erected a ten-story Hotel-Apartment. $30,000 of this loan Defendant in Error was to use to pay and take up a mortgage of the $28,000 then a lien on the property, and $25,000 of this loan was to be paid Mr. Drysdale and his helper to promote the enterprise. The balance, or $670,000, was to be used in erecting the Hotel-Apartment after paying the commissions for financing the loans and the architect for his services.

By the terms of the lease, the lessee, was to pay the following sums of money and perform the following covenants:

(a) Pay the semi annual interest on the $750,000 loan.

(b) Pay the taxes assessed to the property.

(c) Keep up the insurance.

(d) Pay to Defendant in error, the lessor, on the first day of every month, the sum of $312.50 until March 1, 1924; $468.75 on April 1, 1924, and every month thereafter until March 1, 1925; $625 on April, 1925, and every month thereafter until March 1, 1926, and thereafter increase the amount to comport with the terms of the lease.

(e) That at the end of the second year, pay $30,000 on the second mortgage of $250,000, and a like amount every year thereafter, until the $250,000 is paid.

(f) To provide a sinking fund, on the completion of the building by depositing in a bank in the joint names of the lessor and lessee, a sufficient amount to care for the interest on the $750,000 mortgage, the taxes, the insurance, the rent and the $30,000 annual payment due on the $250,000 mortgage.

In 1920, Robert M. Drysdale organized in the State of Delaware a Corporation under the name of the Realty Holding Company, plaintiff in this case, with a capital stock of $1,000,000, with but 10 shares subscribed, representing $1,000 paid in, on which, in fact, nothing had been paid; that immediately after this organization it established offices in the city of Detroit where its President, Robert M. Drysdale, and the other officers permanently reside. This corporation never had functioned, nor did it transact any business whatsoever until the transaction, so-called, in question took place.

That on July 6, 1923, the Clifford Land Company, being in default of its covenants under the Lease, Defendant in Error, took steps under the Summary Proceedings Act, in the courts of Michigan, to dispossess the Clifford Land Company from the premises.

Shortly after the Summary Proceedings were instituted, Mr. Drysdale, as President of the Realty Holding Company, on July 12, 1923, petitioned the Governor of the State of Delaware to have the Realty Holding Company, whose charter had become forfeited on account of nonpayment of the tax due the State of Delaware, reinstated, setting forth in his sworn petition, that the corporation had become "inoperative and void."

Notwithstanding the fact that the Delaware corporation was not reinstated until the 18th day of July, 1923, Mr. Drysdale, as President of the Realty Holding Company, swore to and filed the Bill of Complaint in this case, on July 17, 1923, the day preceding the reinstatement of the Realty Holding Company by the Governor of the State of Delaware, and in virtue of the Bill so filed, procured an Injunction restraining defendant in this case, the lessor in said lease, from proceeding with the Summary Proceedings theretofore instituted in the courts of Michigan, to oust the lessee from the possession of said premises.

That it is the claim of Mr. Drysdale that shortly after instituting the Summary Proceedings to oust the Clifford Land Company from the possession of said premises, that he, as President of the Clifford Land Company, had assigned the 33-year Lease over to the Realty Holding Company of whom he was the President, thereby lending color to the right of the Realty Holding Company, to file its Bill of Complaint in the United States District Court and thereby and in virtue thereof, oust the Courts of Michigan, from jurisdiction in the Summary Proceedings theretofore instituted by the lessee to obtain possession of the premises for the defaults made in the payments of the several sums of money due under the lease.

The so-called assignment was made without consideration and at a time when the Charter of the Realty Holding Company had become "inoperative and void" in the State Delaware and at a time when it could not function, as a corporation, in the State of Michigan, all of which Mr. Drysdale, President of the two Companies, well knew at the time he claims to have assigned the lease over to the Realty Holding Company.

That the claimed assignment was made in direct violation of Sec. 19 of Subdivision (a) of the lease which provides that all sales or assignments of the lease shall be void, unless the rents, taxes, assessments and other sums stipulated to be paid by the lessee, shall be paid.

That in truth and in fact the taxes, assessments on the property, interests on the two mortgages of $500,000 and $250,000, respectively, were, at the time of the alleged assignment, unpaid.

On motion of defendant this Bill of Complaint was dismissed by the Hon. Arthur J. Tuttle, Judge of the District Court of the United States, Eeastern District of Michigan, Southern Division, for want of jurisdiction.

The Realty Holding Company appealed the case to the Supreme Court of the United States, where the case is now pending.

That while the Order giving plaintiff until Jan. 16, 1924, the right to appeal the case to the Supreme Court of the United States, an ex parte application was made to the Court without knowledge or consent of Defendant in Error, to extend the time in which to perfect the appeal, until March 16, 1924, which was granted without Notice to defendant.

That a bond of $10,000 was given by plaintiff, the Realty Holding Company in which its covenants, only, to pay for the ground rent due lessee under the lease.

That neither the Clifford Land Company, the Realty Holding Company, or Robert M. Drysdale, President and

General Manager of the two Companies, are responsible or collectible. They are, in fact, irresponsible and uncollectible.

That neither Robert M. Drysdale, the Realty Holding Company or the Clifford Land Company have paid, laid out, or expended any money for the lot or any money in the construction of the Apartment-Hotel.

Not only the property on which the Apartment-Hotel is erected, but the building, as well, were paid for by Defendant in Error, from her own resources and from the moneys procured on the loan of $750,000 secured by a mortgage on the property, with the added personal obligation on her part to make good all deficiencies.

Mr. Drysdale has openly, defiantly, and repeatedly stated to defendant and to others that he would ruin defendant; that he would delay the hearing on the matters in Court until she would be glad to accept what he had to offer her, in settlement, which, practically, is nothing; that he would, if unsuccessful in this litigation, start other proceedings whereby and in virtue thereof he would tire her out, and in the end, Defendant in Eror would have nothing.

That the several defaults of Mr. Drysdale in not paying the interest on the mortgages as it became due; in not paying the taxes as they became due; in not paying the $30,000 on the principal of the $500,000 and $250,000 mortgages respectively, as provided for in the lease, and in not paying the insurance on the building, has created a condition of intolerance on the part of the mortgagees and because thereof on to-wit, the 29th day of October, 1924, they served a Notice of default on Lavina B. Donald-

son, Defendant in Error and lessor in said lease, notifying her of the defaults accruing on the $500,000 mortgage, and, again, on November 15, 1924, served a Notice of default on the said Lavina B. Donaldson, notifying her of the defaults accruing on the $250,000 mortgage, stating that if the defaults were not made good proceedings would be instituted to foreclose said mortgages.

The Realty Holding Company has never functioned, either in the State of Delaware or in this State. Neither has it owned any property, nor has it transacted any business whatsoever, until the transaction, so-called, in question took place.

Robert M. Drysdale, the President of the Realty Holding Company, permitted its franchise to be forfeited, in neglecting to pay to the State Treasurer of the State of Delaware, the annual taxes due from the Corporation.

Mr. Drysdale never completed the building according to contract and specifications; but had it prepared for occupancy on or about Oct. 25, 1923 and thereafter and in the month of Nov. 1923 moved in and ever since he has occupied one of the apartments with his family for and in behalf of Plaintiff in Error, and managed and conducted the Hotel-Apartment.

That even since the Hotel-Apartment has been occupied by Mr. Drysdale for and in behalf of Plaintiff in Error, he has collected the rentals and has used the same to suit his own caprices.

That Plaintiff in Error, is in default, under the lease as follows:

There is now due and unpaid in interest on the $500,000 mortgage	$ 94,644
There is now due and unpaid on the principal of the $500,000	22,500
Making a total sum of	$117,144
The total sum paid by Plaintiff in Error on said indebtedness is only	30,388.79
Leaving balance due and unpaid on the $500,000 mortgage	86,755.21
There is now due and unpaid on the second, or $250,000 mortgage	27,693.75
Leaving a balance due and unpaid on the $750,000 loan	114,448.96
There is now due and unpaid, taxes for the years 1922-1923-1924	28,823.95
There is now due and unpaid on insurance...	7,660.00
There is now due defendant from lessee under the lease	7,653.25
There is now due and unpaid in other outstanding bills	31,958.42
Total defaults of Plaintiff in Error to date..	$190,544.58

No sinking fund has been deposited by lessee in any bank as provided for in the lease.

Defendant in Error, has now invested in the property over $900,000 with outstanding obligations of nearly $200-

000 all of which constitute a lien on the premises making more than one million dollars ($1,000,000) that she is legally bound to pay,

That should the foreclosure proceedings be instituted it would be exceedingly difficult for Defendant in Error to re-finance the loan, thereby imperilling the entire property.

Not only is her entire property holdings liable to be swept away, but a personal obligation stands against her for all deficiencies.

That under the laws of the State of Michigan, where the lessee is in default in making payments according to the terms of the lease, the lessor may serve a Notice to Quit and within 20 days be restored to the possession of the premises, if the defaults are not made good.

By the questionable methods resorted to by Mr. Drysdale as the president of the two companies, who is practically the owner of the entire stock, which consists of but a few thousand dollars of assets, only, he has been able to stave off proceedings under the Summary Proceedings Act, hold possession of the premises, and without giving security to adequately protect the interests of the lessor, openly and defiantly asserts he will ruin Defendant in Error.

ARGUMENT

The "Statement of Fact" quite clearly sets forth the facts on which this motion is based, and, fully lays the

foundation for the application of the most elementary principles of law, governing such cases.

However, in view of the claim that we make in behalf of Defendant in Error, that had it not been for the Bill of Complaint filed in the District Court of the United States for the Eastern District of Michigan, Southern Division, and the Injunction issued therefrom, enjoining the lessor from proceeding to judgment in the Summary Proceedings instituted in July, 1923, to dispossess the lessee because of the several defaults under the lease, we feel constrained to make the assertion that Defendant in Error, the lessor, would have been restored to the possession of the premises so rightfully belonging to her, within 20 days from the Notice of Default served on the lessee.

Sec. 13240 of the C. L. of Michigan, 1915, under the Summary Proceedings Act, provides that:

> "The person entitled to any premises may recover possession thereof in the manner hereinafter provided in the following cases:
>
> Subdiv. 1 provides that:
>
> "When any person shall hold over any lands or tenements after the time for which they are demised or let to him, or to the person under whom he holds, or contrary to the conditions or covenants of any executory contract for the purchase of lands or tenements, or any lease or agreement under which he holds, or where rent shall have become due on any such lease or agreement and demand of the rent or possession of the premises is waived therein in writing, and not included in the printed form of the lease or agreement."

Subdiv. 2 provides that:

"When any such rent shall have become due on any such lease or agreement, and the tenant, or person in possession shall have neglected or refused for seven days after demand of the possession of the premises, unless waived as aforesaid, made in writing, to deliver up possession of the premises or pay the rent so due."

Sec. 13241 provides that a complaint in writing on oath may be made before the Circuit Court Commissioner setting forth the default.

Sec. 13243 provides for the service thereof, which shall be "at least two days before the time of appearance of or return of the summons."

Sec. 13244 provides for the trial.

The Summary Proceeding Act under which the lessor had proceeded and which she was enjoined from further pursuing to dispossess the lessor is well calculated to dispossess the defaulting tenant in 20 days, at most, after the Notice of Default is served on the defaulting tenant. In view of the undisputed facts, we submit that the Court should, in its discretionary powers, require Plaintiff in Error to either file a bond in such an amount as will fully make good the present defaults of $200,000 and the further anticipated defaults or dissolve the Injunction and dismiss the appeal.

SUMMARIZATION

Defendant in Error, entered into a 33-year lease whereby and in virtue of which the Clifford Land Company, a Michigan Corporation, was placed in possession of a parcel of land in the very heart of the City of Detroit, then worth at least $150,000.

Defendant in Error, borrowed $750,000 which was evidenced by her promissory note and secured by mortgage on this (her) property, which money, except a small amount, was used in the construction of a ten-story Hotel-Apartment.

The lessee was to do certain things and pay certain monies under the terms of the lease, in default of which, he might be dispossessed of the premises under the Summary Proceedings Act, of Michigan, within 20 days after default.

Being in default, a Notice to Quite ws served on the lessee some time in July, 1923, requiring the lessee to pay several thousand dollars and perform certain other covenants under the lease or be dispossessed from the premises.

Robert M. Drysdale, President of the Clifford Land Company and the Realty Holding Company, a Delaware Corporation, claims to have made an assignment of the lease from the Clifford Land Company to the Realty Holding Company, when the Realty Holding Company was a defunct organization and when its Charter had become "void and inoperative" for the fraudulent purpose

of filing the Bill of Complaint in this case and by fraudulent representations Mr. Drysdale obtained an Injunction, restraining the lessor from proceeding to oust the lessee from the premises, under the Summary Proceedings Act, of Michigan.

Notwithstanding the Charter of the Realty Holding Company had become "void and inoperative" Robert M. Drysdale, President of the two companies, swore that the Realty Holding Company was a valid, subsisting and lawful Corporation and functioning as such, on July 17, 1922, and filed the Bill of Complaint in this case, and, in virtue thereof procured an Injunction restraining the lessor from proceeding under the Summary Proceedings Act to dispossess the lessee from the premises, when in truth, and in fact, the Realty Holding Company was not entitled to do business in the State of Delaware or anywhere else, nor was it functioning as a Corporation. In fact, it had forfeited its Charter for the non-payment of its franchise fee.

The defaults under the lease are now $200,000 and upwards. This sum the lessor, under the terms of the lease, is entitled to have paid IMMEDIATELY. The defaults are piling up at the rate of over $13,000 a month. If something isn't done and done quickly, to protect the interest of the lessor, the Defendant in Error, all of her property holdings will be swept away.

No one can, we most humbly submit, read the record and briefs now on file in this case and come to any other conclusion than that Robert M. Drysdale, the President

of the Clifford Land Company, the lessee under the lease, and President of the Realty Holding Company, the so-called Delaware Corporation deliberately concocted the scheme that if he could make an assignment of the lease from the Clifford Land Company to the Realty Holding Company he could institute a suit in the United States Court and thereby block the Summary Proceedings then instituted to dispossess the lessee and through these and other fraudulent means enable the Realty Holding Company to hold possession for an indefinite period of time.

Therefore, Plaintiff in Error ought to be compelled to file a bond in the penal sum of $300,000 to take care of present existing defaults and future liabilities, in default of which, the Injunction ought to be dissolved and the case dismissed.

All of which we most respectfully submit, for the careful consideration of the Court.

Sidney T. Miller,
George L. Canfield,
Lewis H. Paddock,
Ferris D. Stone,
Sidney T. Miller, Jr.,
John C. Spaulding,
Grant L. Cook,
Joseph H. Clark,
Harold H. Emmons,
W. G. Bryant,
George H. Klein,
L. B. Gardner,
Frank L. Dodge,

Attorneys for Defendant in Error.

UNITED STATES OF AMERICA

In the District Court of the United States for the Eastern District of Michigan, Southern Division, In Equity

REALTY HOLDING COMPANY,
Plaintiff,

vs.

LAVINA B. DONALDSON,
Defendant.

County of Wayne ss:

Lavina B. Donaldson being sworn says:

1. That she is the Defendant in Error in the above cause and makes this affidavit in support of her Motion to require Plaintiff in Error to make good the defaults that Plaintiff has suffered to take place under the lease which Plaintiff now holds possession of the Hotel-Apartment in question.

2. That she has read the "Statement of Fact" made by counsel in support of the Motion. That the facts therein stated are true of her own knowledge.

3. That the Hotel-Apartment, if rightly managed, should produce a gross monthly income of $18,000.

4. That Mr. Spears, chief clerk and man in charge of the Hotel, under the employment of Robert M. Drysdale, President of the Clifford Land Company and the Realty

Holding Company, on Oct. 6, 1924, stated that the entire Hotel-Apartment was fully occupied except three apartments.

5. That the Hotel-Apartment consists of 131 apartments renting from $70 to $120 per month, per apartment, with 8 stores on the ground floor with full basement underneath.

6. That Robert M. Drysdale has repeatedly stated that he would ruin this affiant, Defendant in Error; that he would prefer to litigate the case.

7. That the monthly reports made by Robert M. Drysdale in his own behalf and in behalf of the two companies of which he is President, show that the gross receipts are from $8,000 to $10,000 per month, and that the net income as per said reports is but a fraction of the amount required to meet the covenants under the lease. That neither Robert M. Drysdale or the companies of which he is President, have contributed anything toward meeting the several obligations under the lease. That, as the Hotel-Apartment is now being run and the reported income therefrom as accounted for by the said Robert M. Drysdale, the defaults are piling up to such dimensions as to imperil the property holdings of this affiant, the Defendant in Error. And unless something is immediately done to meet the accumulating defaults her whole property will be taken from her.

8. That had it not been for the Bill of Complaint filed in the District Court of the United States for the Eastern District of Michigan, Southern Division, In Equity, and the Injunction issued therefrom, the Summary Proceedings instituted in Michigan by this affiant, the lessor in said lease, in July, 1923, to dispossess Plaintiff in Error from the premises, described in the lease, she would have

regained possession of said premises within 30 days at most, or the Plaintiff in Error would have been obliged to have made good all the defaults under the lease then existing and would have been required, in order to continue in possession, to have made good the defaults now existing of $200,000.

Lavina B. Donaldson.

Subscribed and sworn to before me this 26th day of November, 1924.

Donaldson Craig,

Notary Public Wayne County, Mich.

My commission expires Feb. 23, 1927.

UNITED STATES OF AMERICA

In the District Court of the United States for the Eastern District of Michigan, Southern Division, In Equity

REALTY HOLDING COMPANY, *Plaintiff,*

vs.

LAVINA B. DONALDSON, *Defendant.*

No. 598

County of Wayne: ss.

Donaldson Craig, being duly sworn, says:

1. That he is now and has been for a number of years past a resident of the city of Detroit, Wayne County, State of Michigan.

2. That he is now and has been in the real estate and loan business for a number of years last past, in the city of Detroit and is now located at No. 1805 Washington Bld. Bldg., in said city of Detroit.

3. That he is personally acquainted with Robert M. Drysdale, who claims to the President and Manager of the Realty Holding Company, a Delaware Corporation, so-called, and the Clifford Land Company, a Michigan Corporation, so-called.

4. That he has positive information that the Apartments were all occupied except three, some three to four weeks ago.

5. That said Apartment-Hotel is located in the very heart of the city of Detroit and well adapted for a hotel and apartment purposes. That said Apartment-Hotel consists of 131 apartments, 8 stores on ground floor and a full basement beneath. That when fully occupied they will bring in $18,000 and upwards per month.

6. That Robert M. Drysdale claims that said Apartment rents bring in only from $8,000 to $10,000 per month.

7. That Robert M. Drysdale has repeatedly stated to this affiant that he would delay the matters in Court between plaintiff and defendant until the defaults would accumulate to such an amount as would make it impossible for Lavina B. Donaldson to re-finance or care for the loans, even though she finally succeeded in dispossessing him.

8. That Robert M. Drysdale also stated to this affiant that he would harrass Miss Donaldson with suits and litigation to such a degree that she would be willing to ac-

cept his terms of settlement and thereby force her to turn the property over to him.

Donaldson Craig.

Subscribed and sworn to before me this 26th day of November A. D. 1924.

Josephine Fox,

Notary Public, Wayne County, Michigan.

My commission expires January 4th, 1927.

REALTY HOLDING COMPANY *v.* DONALDSON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 348. Argued April 28, 1925.—Decided May 25, 1925.

1. An allegation that a defendant in the District Court is a "resident" of the State in which the suit is brought is not a sufficient allegation of citizenship there; but the defect is amendable when such citizenship is conceded; and on appeal the amendment will be considered as made rather than send the case back for that purpose. P. 399.
2. A suit for specific performance of the covenants of a lease is a suit to recover upon a chose in action, within the meaning of Jud. Code,

§ 24, "First", and cannot be maintained in the District Court on the ground of diverse citizenship if the plaintiff sues as assignee of the lease and seeks only such additional relief as is purely incidental to the main object. P. 400.

294 Fed. 541, affirmed.

APPEAL from a decree of the District Court dismissing a bill for specific performance, for want of jurisdiction.

Mr. John R. Rood, for appellant.

Mr. John C. Spalding, with whom *Messrs. Sidney T. Miller, George L. Canfield, Lewis H. Paddock, Ferris D. Stone, Sidney T. Miller, Jr., Grant L. Cook, Joseph H. Clark, Harold H. Emmons, W. G. Bryant, George H. Klein, L. B. Gardner*, and *Frank L. Dodge* were on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The jurisdiction of the court below was invoked upon the ground of diverse citizenship, Jud. Code, § 24, First; and the court dismissed the bill under the limiting clause contained in that subdivision: "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made." 294 Fed. 541.

The bill alleges that appellant is a Delaware corporation and appellee a "resident" of Michigan. This is not a sufficient allegation of appellee's Michigan citizenship. *Robertson* v. *Cease*, 97 U. S. 646, 648; *Wolfe* v. *Hartford Life Ins. Co.*, 148 U. S. 389; *Oxley Stave Company* v.

Butler County, 166 U. S. 648, 655. It was, however, conceded by appellee in the court below, as well as here, that she was in fact a citizen of Michigan; and the court below assumed the point. Since the defect may be cured by amendment and nothing is to be gained by sending the case back for that purpose, we shall consider the amendment made and dispose of the case. *Norton* v. *Larney*, 266 U. S. 511, 515–516; *Howard* v. *De Cordova*, 177 U. S. 609, 614.

Shortly stated, the bill alleges that appellee was the owner of certain real property in Michigan which she had leased to the Clifford Land Company, a Michigan corporation; that the Clifford Land Company had undertaken to finance for appellee the erection of a building upon such property; that appellant had executed and delivered to appellee two conveyances of other real property in Michigan as security for the erection of such building in accordance with the promises of the land company; that appellee had violated the terms of the lease in certain particulars set forth; and that appellant, "in order to protect its rights and property in the premises" etc., procured an assignment to it from the land company of the said lease. The specific relief prayed is a decree for "specific performance by the said defendant of her said several undertakings" and for an injunction against interferences with appellant under the lease.

The assignor, being a Michigan corporation, could not have prosecuted the suit in a federal court if no assignment had been made. The phrase "to recover upon any . . . chose in action," under the decisions of this Court, includes a suit to compel the specific performance of a contract or otherwise to enforce its stipulations. *Corbin* v. *County of Black Hawk*, 105 U. S. 659, 665; *Shoecraft* v. *Bloxham*, 124 U. S. 730; *Plant Investment Co.* v. *Key West Railway*, 152 U. S. 71, 76; *New Orleans* v. *Benjamin*, 153 U. S. 411, 432. An examination

of the bill of complaint discloses that the suit is primarily for a specific performance of the covenants of the lease. Additional relief sought is purely incidental to this main object. The case, therefore, falls within the doctrine of the foregoing decisions, and the court below was right in adjudging a dismissal. *Kolze* v. *Hoadley,* 200 U. S. 76, 83 *et seq.; Citizens Savings Bank* v. *Sexton,* 264 U. S. 310, 314.

The cases relied upon by appellant are not in point. *Brown* v. *Fletcher,* 235 U. S. 589, was a suit against a trustee by an assignee to recover an interest in an estate under an assignment by the *cestui que trust.* This Court held that the relation between trustee and *cestui que trust* was not contractual; that the rights of the beneficiary depended upon the terms of the will creating the trust; and that a suit by the beneficiary or his assignee against the trustee for the enforcement of rights in and to the property held for the benefit of the beneficiary could not be treated as a suit on a contract or a chose in action. The Court then said (p. 599): "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action. For he had an admitted and recognized fixed right to the present enjoyment of the estate with a right to the corpus itself when he reached the age of fifty-five. His estate in the property thus in the possession of the trustee, for his benefit, though defeasible, was alienable to the same extent as though in his own possession and passed by deed. [Citing cases.] The instrument by virtue of which that alienation was evidenced,—whether called a deed, a bill of sale, or an assignment,—was not a chose in action payable to the assignee, but an evidence of the assignee's right, title, and estate in and to property. Assuming that the transfer was not colorable or fraudulent, the Federal statutes have always permitted the vendee or assignee to sue in the United States courts to

recover property or an interest in property when the requisite value and diversity of citizenship existed."

Crown Orchard Co. v. *Dennis,* 229 Fed. 652, was a suit by the grantee of standing timber to enjoin the cutting and conversion of the timber,—in effect, a suit to prevent waste. There was no attempt to enforce any contractual obligation; and the court very naturally held that the case did not fall within the exception in § 24 of the Judicial Code. It was expressly assumed by the court that if the suit had been to enforce a contract or for specific performance, the rule would have been otherwise.

The distinction is between a cause of action arising out of the ownership or possession of property transferred by the assignment of a contract,—in which case the remedy accrues to the person who has the right of property or of possession at the time,—and a suit to enforce the obligations of the assigned contract. *Deshler* v. *Dodge,* 16 How. 622, 631; *Ambler* v. *Eppinger,* 137 U. S. 480. The present suit falls within the latter class. It is brought, not to recover property or to redress an injury to property which appellant had acquired through an assignment of a lease, but to enforce contractual obligations of the lease. No direct relief is sought in respect of appellant's lands conveyed as security, and they are affected only collaterally and incidentally. See *Kolze* v. *Hoadley, supra.*

Judgment Affirmed.